No. 16-254

Title:	Water Splash, Inc., Petitioner v. Tara Menon
Docketed:	August 29, 2016
Lower Ct:	Court of Appeals of Texas, Fourteenth District
Case Nos.:	(14-14-00012-CV)
Decision Date:	June 30, 2015
Discretionary Court Decision Date:	May 27, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 25 2016	Petition for a writ of certiorari filed. (Response due September 28, 2016)
Aug 31 2016	Waiver of right of respondent Tara Menon to respond filed.
Sep 14 2016	DISTRIBUTED for Conference of October 7, 2016.
Sep 22 2016	Response Requested. (Due October 24, 2016)
Oct 13 2016	Brief of respondent Tara Menon in opposition filed.
Oct 25 2016	Reply of petitioner Water Splash, Inc. filed.
Nov 2 2016	DISTRIBUTED for Conference of November 22, 2016.
Nov 28 2016	DISTRIBUTED for Conference of December 2, 2016.
Dec 2 2016	Petition GRANTED.
Jan 17 2017	Joint appendix filed. (Statement of costs filed.)
Jan 17 2017	Brief of petitioner Water Splash, Inc. filed.
Jan 24 2017	Brief amicus curiae of United States filed.
Feb 3 2017	SET FOR ARGUMENT on Wednesday, March 22, 2017
Feb 3 2017	Record requested from the Court of Appeals of Texas, Fourteenth District.
Feb 14 2017	Brief of respondent Tara Menon filed.
Feb 14 2017	Motion for divided argument filed by petitioner Water Splash, Inc.
Feb 21 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 22 2017	Record received from the Court of Appeals of Texas, Fourteenth District. The record is electronic.
Feb 22 2017	CIRCULATED.
Mar 6 2017	Motion for divided argument filed by petitioner DENIED.
Mar 6 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 13 2017	Reply of petitioner Water Splash, Inc. filed. (Distributed)
Mar 22 2017	Argued. For petitioner: Jeremy Gaston, Houston, Tex.; and Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Timothy A. Hootman, Houston, Tex.

May 22 2017	Judgment VACATED and case REMANDED. Alito, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of the case.
Jun 26 2017	MANDATE ISSUED.
Jun 26 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

FILED
AUG 25 2016

No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1965, the member states of the Hague Conference on Private International Law, including the United States, adopted a treaty known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). The Hague Service Convention enables service of process from one member state to another without the use of consular or diplomatic channels. This case presents the following federal question on which state and federal courts have been divided for over 25 years:

Does the Hague Service Convention authorize service of process by mail?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

PARTIES TO THE PROCEEDING 1

RULE 29.6 STATEMENT 1

JURISDICTION 1

TREATY PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 14

I. The question presented implicates a longstanding and deep split of authority on a fundamental question of civil procedure 14

II. The question presented arises frequently. 15

III. The question presented implicates fundamental principles of treaty interpretation whose proper application is of widespread importance. 15

IV. This case is a good vehicle to address the issue. 16

CONCLUSION 17

APPENDIX

Opinion of the Court of Appeals 1a

Order Denying Rehearing En Banc 47a

TABLE OF CONTENTS – continued

Page

Order Denying Petition for Review.....48a

TABLE OF AUTHORITIES

Page(s)

Cases

Ackermann v. *Levine*,
788 F.2d 830, 838-39 (2d Cir.1986) 7

Arco Elec. Control Ltd. v. *Core Intern.*,
794 F. Supp. 1144 (S.D. Fla. 1992) 7

Bankston v. *Toyota Motor Corp.*,
889 F.2d 172 (8th Cir. 1989) 5

Borschow Hospital & Medical Supplies, Inc. v. *Burdick–Siemens Corp.*,
143 F.R.D. 472 (D.P.R. 1992) 7

Brockmeyer v. *May*,
383 F.3d 798 (9th Cir. 2004) 7

Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*,
447 U.S. 102 (1980) 5

Dierig v. *Lees Leisure Indus., Ltd.*,
CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012) (mem. op.) 7

Frankenmuth Mut. Ins. Co. v. *ACO, Inc.*,
484 N.W.2d 718 (Mich. App. 1992) 14

Girafa.com, Inc. v. *Smartdevil Inc.*,
728 F.Supp.2d 537 (D. Del. 2010) 7

Hayes v. *Evergo Tel. Co., Ltd.*,
397 S.E.2d 325 (N.C. App. 1990) 14

Koehler v. *Dodwell*,
152 F.3d 304, 307-08 (4th Cir. 1998) 7

TABLE OF AUTHORITIES – continued

Page(s)

Meek v. *Nova Steel Processing, Inc.*,
706 N.E.2d 374 (Ohio App. 1997) 14

New York State Thruway Auth. v. *Fenech*,
94 A.D.3d 17 (N.Y. App. Div. 2012) 14

Nicholson v. Yamaha Motor Co., Ltd.,
566 A.2d 135 (Md. App. 1989) 14

Nuovo Pignone, SpA v. *STORMAN ASIA M/V*,
310 F.3d 374 (5th Cir. 2002) 4, 5, 6, 13

Penrod Drilling Corp. v. *Williams*,
868 S.W.2d 294 (Tex. 1993) (per curiam) 7-8

Raffa v. *Nissan Motor Co. Ltd.*,
141 F.R.D. 45 (E.D. Pa. 1991) 7

Research Sys. Corp. v. *IPSOS Publicite*,
276 F.3d 914 (7th Cir. 2002) 7

Sandoval v. Honda Motor Co., Ltd.,
527 A.2d 564 (Pa. Super. 1987) 14

TracFone Wireless, Inc. v. *Does*,
No. 11-cv-21871-MGC,
2011 WL 4711458
(S. D. Fla. Oct. 4, 2011) (mem. op.) 7

Volkswagenwerk Aktiengesellschaft v. *Schlunk*,
486 U.S. 694 (1988) 11

TABLE OF AUTHORITIES – continued

Page(s)

Treaties, Statutes, and Rules

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ..... *passim*

Other Authorities

Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A. J. 650 (1965) 12

Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities,* 12 OR. REV. INT'L L. 283 (2010) 13

Beverly L. Jacklin, *Service of process by mail in international civil action as permissible under Hague Convention,* 112 A.L.R. FED. 241 (1993 & 2013 Supp.) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Water Splash, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals, Houston, Texas.

OPINION BELOW

The opinion of the court of appeals (App. 1a-46a) is reported at 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). The order of the Supreme Court of Texas denying review (47a) is unpublished.

PARTIES TO THE PROCEEDING

The caption includes the names of all parties in the court of appeals.

RULE 29.6 STATEMENT

The petitioner does not have a parent corporation or shares held by a publicly traded company.

JURISDICTION

The court of appeals entered judgment on June 30, 2015. App. 1a. Petitioner filed a timely motion for rehearing en banc, which was denied on October 6, 2015. App. 47a. Petitioner filed a timely petition for review, which the Supreme Court of Texas denied on May 27, 2016. App. 48a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

TREATY PROVISION INVOLVED

Article 10 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in

Civil or Commercial Matters, 20 U.S.T. 361 (1969) provides in full:

> Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

STATEMENT

A. Background

Petitioner Water Splash, Inc. makes aquatic playground systems known as "splash pads" that are popular in municipalities. Petitioner sued respondent Tara Menon, a citizen of Canada, in state district court in Galveston, Texas for unfair competition and tortious interference with business relations. App. 2a-3a. Petitioner specifically alleged that Menon, once a sales rep for Water Splash, went to a competitor who then used Water Splash's designs and drawings in

submitting a bid to the City of Galveston for the construction of splash pads at two city parks. Ibid.

The trial court authorized Water Splash to effectuate service of process on Menon in Canada by several forms of service, including certified mail, which Water Splash accomplished. Id. at 3a.

After Menon failed to answer or otherwise appear, Water Splash moved for default judgment. Ibid. The trial court granted the motion and awarded actual and exemplary damages and attorneys' fees. Ibid. Menon filed a motion for new trial seeking to set aside the default judgment based on the argument that service had not been accomplished consistent with the requirements of the Hague Service Convention. Ibid. The trial court denied Menon's motion. Ibid.

B. Appellate History

1. The Panel Majority

On appeal, the court addressed whether the Hague Service Convention allows service of process by mail. Article 10(a) of the Hague Service Convention states that:

> Provided the State of designation does not object, the present Convention does not interfere with . . . the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad . . . .

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters ("Hague Service Convention"), art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (emphasis added). The determinative question was therefore whether "send" includes "service of process" or, alternatively, only covers transmittal of other judicial documents (*e.g.*, after service of process has already been effectuated).

The panel majority followed a federal Fifth Circuit case and held that "send" does not include "service of process":

> "In [*Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002)], plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term 'send' in connection with the delivery of judicial documents, but used 'serve,' 'service,' and 'to effect service' in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed 'send' and determined that, because 'service' was used throughout the Hague Convention while 'send' was confined solely to article 10(a), this demonstrated that the drafters did not 'intend to give the same meaning to "send" that they intended to give to "service." ' *Id.* at 384.
>
> . . .

> We conclude that the better-reasoned approach is to follow the so-called 'minority view' which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail."

App. 6a, 8a.

In reaching the result above, the panel majority (like the Fifth Circuit) relied primarily on the following principle of statutory construction:

> "'"Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" through the Hague Convention, while confining use of the word "send" to article 10(a), we will not presume that the drafters intended to give the same meaning to "send" that they intended to give to "service."'
>
> *Nuovo*, 310 F.3d at 384 . . . ."

App 8a. The panel majority also noted that the Eighth Circuit had reached the same result for essentially the same reason. Id. at 8a-9a (citing *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989)).

The panel majority secondarily relied on the assumption (also expressed by the Fifth Circuit) that

it was unlikely for the drafters of the Hague Service Convention to have put in place specific methods of service in Articles 2 through 7 (through central authorities or diplomatic channels) "'while simultaneously permitting the uncertainties of service by mail.'" App. 9a (quoting *Nuovo Pignone*, 310 F.3d at 385). The panel majority then vacated the trial court's judgment and remanded for further proceedings. App. 11a.

2. The Panel Dissent

Justice Tracy Christopher dissented. The crux of her reasoning was that treaties are not statutes: they are contracts between sovereigns whose interpretation is governed by different legal principles. In turn, state courts must follow these principles because they are based on controlling precedent from the Supreme Court:

> "[T]he majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention."

App. 11a.

The dissent noted the two lines of cases on the

issue. The prevailing view – adopted by federal courts of appeals for the Second, Fourth, Seventh, and Ninth Circuits (and some district courts in the First, Third, Sixth and Eleventh Circuits)[1] – holds that "send" includes "service of process." The minority view – adopted by the Fifth and Eighth Circuits (and some older cases from district courts in the Third and Eleventh Circuits)[2] – holds that it does not. App. 14a. The dissent then explained that the job of the court was to choose the most persuasive view based on controlling principles of treaty interpretation:

> "This provision [Hague Service Convention, Article 10(a)] had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp.* v.

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[1] See *Ackermann* v. *Levine*, 788 F.2d 830, 838-39 (2d Cir.1986); *Koehler* v. *Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp.* v. *IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); *Brockmeyer* v. *May*, 383 F.3d 798, 802 (9th Cir. 2004); *Dierig* v. *Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012) (mem. op.); *TracFone Wireless, Inc.* v. *Does*, No. 11-cv-21871-MGC, 2011 WL 4711458 (S. D. Fla. Oct. 4, 2011) (mem. op.); *Girafa.com, Inc.* v. *Smartdevil Inc.*, 728 F.Supp.2d 537 (D. Del. 2010); *Borschow Hospital & Medical Supplies, Inc.* v. *Burdick–Siemens Corp.*, 143 F.R.D. 472 (D.P.R. 1992).

[2] *Nuovo Pignone SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Raffa* v. *Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Arco Elec. Control Ltd.* v. *Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992).

> *Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts 'are *obligated* to follow only higher Texas courts and the United States Supreme Court')."
>
> "Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, ***there is binding precedent that tells us how to find that answer for ourselves***. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles."

App. 14a-15a.

The dissent then listed over a dozen principles of treaty interpretation that are binding on state and federal courts under Supreme Court precedent:

- A treaty is not legislation.
- A treaty is not construed in the same way as legislation.
- A treaty is construed in the manner of a contract.
- A treaty is construed more liberally than a private contract

- Such a liberal construction is required to secure equality and reciprocity between the signatories.

- Although the construction of a treaty begins with its text, courts are not permitted to end the inquiry there.

- The text of the treaty must be read with a view to making effective the purposes of the high contracting parties.

- The treaty must be read in a manner consistent with the shared expectations of the contracting parties.

- To identify those shared expectations, courts must consider the treaty's negotiating and drafting history.

- Where the official text of the treaty is written in two languages, courts should consider both languages in analyzing the parties' shared expectations.

- In addition to considering the text, courts must consider the way the text was interpreted by the delegates involved in negotiating and drafting the treaty.

- The interpretation of a treaty by the Executive Branch of the United States is entitled to great weight.

- The opinions of other signatories are entitled to considerable weight.

- Courts should consider the analysis of scholars.

App. 15a-22a. Based on the above, the dissent concluded that the term "send" includes "service of process":

First, the dissent determined that the Hague Service Convention's purpose was limited to service of process issues. This indicated that the term "send" in Article 10(a) meant "service of process" because non-service transmittals were not within the scope of the Convention in the first place:

> "By agreeing with Menon's argument that 'she was not served pursuant to the Hague Convention service of process provisions,' the majority necessarily has concluded that there are non-service provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 'eliminate[d] the possibility' that the Service Convention could apply to transmissions abroad 'that do not culminate in service'[.]
>
> . . .
>
> In accordance with the United States Supreme Court's analysis, I would conclude

> that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to 'send[ing] judicial documents' means 'serv[ing] judicial documents.' "

App. 23a-25a (citing *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988)).

Second, the dissent considered the negotiation and drafting history of the treaty and stated that she "would give considerable weight to the fact that '[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail.' " App. 25a. The dissent also would have considered a Convention report:

> "The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."

App. 25a-26a. From this, the dissent concluded that "[i]f Article 10(a) was considered to include service by telegram, and not to be 'limited to registered mail,' then it cannot be said, as the majority now holds, that this provision does not permit service by mail." *Id.* at 26a.

Third, the dissent noted the understanding of

Philip Amram (part of the United States delegation to the Hague Conference that drafted the Service Convention). *Id.* Amram's understanding was clear: "Article 10 permits direct service by mail . . . unless [the receiving] state ***objects*** to such service." *Id.* at 27a (quoting Philip Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965)) (emphasis added).

Fourth, the Executive Branch "has unwaveringly maintained that Article 10(a) permits service by mail." App. 27a; see also *id.* ("In accordance with the instructions from the United States Supreme Court, I would give such views 'great weight.' ").

Fifth, the dissent relied on a Hague Report which established the signatories' post-ratification understanding that service by mail was allowed. App. 29a ("[T]heoretical doubts about the legal nature of the procedure were unjustified."); *id.* ("I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail.").

Sixth, the dissent noted that it "would follow the example of the United States Supreme Court in consulting the writings of [noted scholar] Bruno Ristau as to the intentions of the Service Convention's drafters":

> " ' Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that ... every participant in the debates concerning Article 10(a) ... understood the provision as referring to

> ... the use of postal channels for the purpose of service." Another analysis said "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention ... believe that to be the case." Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object." ' "

App. 31a (quoting Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010)).

Finally, the dissent noted analytical problems with the majority's analysis. Most notably, the dissent criticized the majority's reliance on *Nuovo Pignone* because in that case, the Fifth Circuit relied on principles of statutory interpretation, not treaty interpretation. App. 33-35a; *id.* at 34a ("[T]he Fifth Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. . . . This approach follows none of the governing precepts of treaty construction."). The dissent also criticized the Fifth Circuit's reliance on unsupported assumptions, such as the assumption that the drafters of the Hague Service Convention would not have permitted service by mail when other, ostensibly more reliable methods of service were

available. App. 36-39a.[3]

REASONS FOR GRANTING THE PETITION

I. The question presented implicates a longstanding and deep split of authority on a fundamental question of civil procedure.

The question presented is the subject of a 4-2 split in the federal appellate courts, with the majority view favoring petitioner. See *supra* notes 1-2. The question presented is also the subject of a 4-4 split among state appellate courts, including the appellate courts of seven of the ten largest States.[4] Finally, the split of authority on this federal question has persisted for over 25 years without showing any sign of resolving on its own. See *supra* notes 1-2.

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[3] The dissent also criticized the majority's reliance on recent Texas federal district court cases because those courts were bound to follow *Nuovo Pignone*. App. 42a. In addition, the dissent criticized the majority's reliance on decisions by other Texas courts because in "none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court." App. 43a-45a.

[4] Compare *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 22 (N.Y. App. Div. 2012); *Nicholson* v. *Yamaha Motor Co., Ltd.*, 566 A.2d 135, 141 (Md. App. 1989); *Hayes* v. *Evergo Tel. Co., Ltd.*, 397 S.E.2d 325, 328 (N.C. App. 1990); and *Sandoval* v. *Honda Motor Co., Ltd.*, 527 A.2d 564, 566 (Pa. Super. 1987) (each holding that "send" includes "service of process"), with *Meek* v. *Nova Steel Processing, Inc.*, 706 N.E.2d 374, 377 (Ohio App. 1997); *Frankenmuth Mut. Ins. Co. v. ACO, Inc.*, 484 N.W.2d 718 (Mich. App. 1992); *Honda Motor Co.* v. *Superior Court*, 10 Cal. App. 4th 1043 (Cal. Ct. App. 1992); and the instant case (each holding the opposite).

II. The question presented arises frequently.

The question presented potentially arises in any state or federal lawsuit with a defendant who is a citizen of another signatory to the Hague Service Convention. By way of example, a recently updated ALR cites over 120 state and federal decisions (from district and appellate courts in 11 federal circuits and 16 states) implicating the propriety of mail for service of process on foreign defendants under the Hague Service Convention. See Beverly L. Jacklin, *Service of process by mail in international civil action as permissible under Hague Convention*, 112 A.L.R. FED. 241 (1993 & 2013 Supp.).[5] And going forward, one would expect this issue to arise with increasing frequency as globalization leads to more cross-border disputes.

III. The question presented implicates fundamental principles of treaty interpretation whose proper application is of widespread importance.

The question presented may seem simple on its face, but if it were a deep split would not persist. Moreover, the question implicates principles of treaty interpretation that are not only important but also so basic and fundamental that their correct application in a case like the present would resolve not only this matter, but also would influence judicial analysis of similar questions by lower courts in other cases.

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[5] Not all cases cited therein address the specific question whether "send" includes "service of process," but the number of decisions does reflect the prevalence of the overarching issue (service of process by mail on foreign defendants).

IV. This case is a good vehicle to address the issue.

This case is a good vehicle to address the question presented, as it is the only issue in the case. App. 12a (Christopher, J., dissenting) (explaining that the case "present[s] only a single narrow question of law").

Against this, respondent will argue that the question presented is somehow moot because, even if service of process had been proper under the Hague Service Convention, it was somehow improper under Canadian domestic law. But even assuming that were correct for the sake of argument, it is a red herring for two reasons:

First, although the propriety of service under Canadian law might be relevant in other circumstances (such as a post-judgment enforcement proceeding in Canada), it has no bearing on whether service of process was proper in this case under federal law, the only issue of relevance in a domestic lawsuit.

Second, in the court of appeals, respondent conceded that the only question at issue in this case was the federal question presented here. App. 13a (Christopher, J., dissenting) ("[Menon] concedes that [i]f Article 10(a) authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good." (internal quotation marks omitted)).

All that said, one factor that ordinarily would counsel against review in this particular case is that

it originates from an intermediate state court rather than a state supreme court or an intermediate federal court. And certainly, that might be determinative if the split were recent or highly lopsided, or the case implicated the majority view or was unpublished, or if there otherwise were a lack of lower court analysis supporting petitioner. But none of that is the case here: the split is deep, over 25 years old, and the present case implicates the minority view. In addition, Justice Christopher's published dissent is one of the most detailed and thorough analyses supporting petitioner's position.

In addition, the longstanding nature of the split coupled with the fact that the issue has already been addressed by so many federal courts means that, as a practical matter, the question presented is likely to continue reaching this Court from state intermediate courts given the discretionary review of most state high courts.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] Because this case implicated no split *within Texas*, it was perhaps unsurprising that the state high court denied review.

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AUGUST 25, 2016

APPENDIX

472 S.W.3d 28

Court of Appeals of Texas,

Houston (14th Dist.).

Tara Menon, Appellant

v.

Water Splash, Inc., Appellee

NO. 14–14–00012–CV

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Opinions filed June 30, 2015

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Rehearing En Banc Overruled October 6, 2015

Synopsis

Background: Employer sued its former employee, who now worked for competitor, and competitor, alleging unfair competition, conversion, tortious interference with business relations, and conspiracy. After employee did not file an answer or otherwise appear, employer moved for default judgment . The District Court granted motion for default judgment against employee. Employee filed motion for new trial to set aside the default judgment. The 212th District Court, Galveston County, denied employee's motion, and employee appealed.

[Holding:] The Court of Appeals, John Donovan, J., held that service by mail to a defendant, namely former employee, in Canada was not permitted by Hague Convention.

Reversed and remanded.

Christopher, J., filed dissenting opinion.

***29 On Appeal from the 212th District Court, Galveston County, Texas, Trial Court Cause No. 13–CV–0205, Susan Elizabeth Criss, Judge.**

Attorneys and Law Firms

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Panel consists of Justices Christopher, Donovan, and Wise

OPINION

John Donovan, Justice

****1** Appellant, Tara Menon ("Menon"), appeals the trial court's default judgment granted after she failed to answer the suit filed by appellee, Water Splash, Inc. ("Water Splash"). In four issues, Menon contends that the trial court erred in refusing to set aside the default judgment because state law cannot allow service of process in foreign nations where the service does not comport with the requirements of the Hague Service Convention. We reverse and remand.

I. BACKGROUND

Menon is a citizen of Canada, residing in Quebec. Water Splash is a Delaware corporation with its principal office located in Champlain, New York. Water Splash sued Menon in Galveston, Texas. In its original petition, Water Splash alleged that Menon was its regional sales representative and that Menon also began to act as a sales manager for South Pool, a competitor of Water

Splash. Sometime in 2012, Water Splash discovered that South Pool had used some of Water Splash's designs and drawings when submitting a bid to the City of Galveston for the construction of splash pads at two parks. A year later, Water Splash sued South Pool and Menon for unfair competition, conversion, tortious interference with business relations, and conspiracy.

To effectuate service, Water Splash filed a motion for alternative service of process pursuant to Texas Rule of Civil Procedure 108a. *See* Tex. R. Civ. P. 108a. The motion requested that the trial court order service on Menon in Quebec, Canada, by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." The trial court granted the motion.

After Menon did not file an answer or otherwise appear, Water Splash moved for default judgment alleging it had diligently sought service on Menon utilizing the methods allowed for substituted service. The motion stated that service was accomplished by sending a letter to Menon's Quebec address by certified mail, return receipt requested and first class mail, and Water Splash introduced evidence of those attempts at service. Water Splash also alleged that Menon's emails proved she knew of the existence of the suit. The trial court granted the motion for default judgment against Menon and awarded actual and exemplary damages and attorneys' fees.

Menon filed a motion for new trial seeking to set aside the default judgment because service was not accomplished pursuant to the terms of article 10(a) of the Hague Service Convention. Water Splash responded, arguing Rule 108a was an acceptable form

of alternative service. The trial court denied Menon's motion for new trial.

II. ANALYSIS

In four interrelated issues involving the interpretation of particular words in the Hague Service Convention, appellant attacks the trial court's grant of default judgment and denial of her motion for new trial.

*31 A. Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma,* 288 S.W.3d 922, 925 (Tex.2009). A trial court abuses its discretion if it reaches a decision without reference to any guiding rules or principles, or acts in an arbitrary or unreasonable manner. *Cire v. Cummings,* 134 S.W.3d 835, 838–39 (Tex.2004); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.,* 231 S.W.3d 71, 76 (Tex.App.–Houston [14th Dist.] 2007, pet. denied).

**2 [1] [2] [3] [4]Absent waiver, a trial court lacks personal jurisdiction over a defendant to whom citation has not been "issued and served in a manner provided for by law." *See Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex.1990). In a direct appeal from a no-answer default judgment, there is no presumption of valid issuance, service, and return of citation. *See id.* (quoting *Uvalde Country Club v. Martin Linen Supply Co.,* 690 S.W.2d 884, 886 (Tex.1985)) (per curiam). Thus, a default judgment cannot withstand a direct attack unless the record affirmatively shows strict compliance with the rules for service of citation. *Primate Constr., Inc. v. Silver,* 884 S.W.2d 151, 152 (Tex.1994) (per curiam). Whether a trial court has personal jurisdiction over a defendant is a question of law, which we review *de novo.*

Haaksman v. Diamond Offshore (Bermuda), Ltd., 260 S.W.3d 476, 479 (Tex.App.–Houston [14th Dist.] 2008, pet. denied).

B. Hague Convention

Articles 2 through 7 of the Hague Convention require a signatory nation to establish a "Central Authority" which acts as an agent to handle various matters regarding requests for service, service of documents and proof of service. Article 10(a) of the Hague Convention, at issue here, states:

> Provided the State of designation does not object, the present Convention does not interfere with
>
> (a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent person of the State of origin to effect *service* of judicial documents directly through the judicial officer, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect *service* of judicial document directly through the judicial officers, officials, or other competent persons of the State of destination.

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, *available at* http:www.hcch.net/index_en.php?act=conventions.text & cid=17 (last visited June 22, 2015) ("Hague Convention"). The question before us turns on the meaning attributed to "send" and "service."

[5] [6]Where it applies, compliance with the provisions of

the Hague Convention is "mandatory." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698–99, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988). Its purpose is to provide a more efficient and effective manner of service of process abroad and to ensure that defendants sued in foreign jurisdictions receive timely notice of suit. *Id.* at 699, 108 S.Ct. 2104; *see also Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir.2002). In *Nuovo*, plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Federal Rule of Civil Procedure. 4(f)(1) *32 because it did not comply with the Hague Convention, the defendant urged that the drafters used the term "send" in connection with the delivery of judicial documents, but used "serve," "service," and "to effect service" in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed "send" and determined that, because "service" was used throughout the Hague Convention while "send" was confined solely to article 10(a), this demonstrated that the drafters did not "intend to give the same meaning to 'send' that they intended to give to 'service.' " *Id.* at 384. In short, the drafters intended to attach meaning to the specific word used. *See id.*

[7]The Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361, art. 1. The Hague Convention "preempts any inconsistent methods of service prescribed by Texas law in all cases where the Convention applies." *Wuxi Taihu Tractor Co, Ltd. v. York Group, Inc.*, No. 01–13–00016–CV, 2014 WL 6792019, at *5 (Tex.App.–Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem.op.) (citing

Paradigm Entm't Inc. v. Video Sys. Co., No. Civ. A. 3.99–CV–2004P, 2000 WL 251731, at *4 (N.D.Tex. Mar. 3, 2000)) (concluding service was effective where secretary of state forwarded a copy of service of process to defendant pursuant to Texas law, and Japan did not object to this manner of service).

C. Application of article 10(a)

**3 Menon argues the default judgment should not have been rendered because she was not served with process. *See* Tex. R. Civ. P. 124 ("In no case shall judgment be rendered against any defendant unless upon service...."). Menon further asserts that Water Splash did not effectuate service under Rule 108a, providing for service in a foreign country "pursuant to the terms of any treaty or convention," because she was not served pursuant to the Hague Convention service of process provisions. She argues "the drafters use the words 'serve,' 'service,' and 'to effect service' in other sections, including subparts (b) and (c) of article 10," but they only used the word "send" in subsection (a), which applies only to sending judicial documents. *See Nuovo*, 310 F.3d at 383.

Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does not object.[1] Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.[2]

[1]Canada has not objected to the use of the mail for service of process. *See* Canada—Central Authority & Practical Information, HAGUE CONF. OF PRIVATE INT'L. L., http://www.hcch.net/index_en.php?act=authorities.details & aid=248 (last updated Aug. 19, 2014)

(listing the text of Canada's declarations, including those to "[t]ransmission through postal channels," and stating that "Canada does not object to service by postal channels" as permitted in article 10(a)); *see also Dierig v. Lees Leisure Indus., Ltd.*, CIV.A. 11–125–DLB, 2012 WL 669968, at *19 (E D.Ky. Feb. 28, 2012) (mem.op.).

[2] *Ackermann v. Levine*, 788 F.2d 830, 838–39 (2nd Cir.1986); *Koehler v. Dodwell*, 152 F.3d 304, 307–08 (4th Cir.1998); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir.2002); and *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir.2004).

[3] We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.

> ***33** 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' throughout the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'

Id. at 384 (relying on canons of statutory interpretation and adopting the reasoning of the courts which concluded that article 10(a) of the Hague does not permit service of process by mail); *see also Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir.1989) (stating that language used should be regarded as conclusive and concluding that article 10(a) prohibits

service of process by registered mail); *see also Wuxi,* 2014 WL 6792019, at *6 (citing *Nuovo,* 310 F.3d at 384). *Wuxi* involved service on a defendant located in China attempted under Rule 108a. 2014 WL 6792019, at *6,. The *Wuxi* court held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served throughout the Central Authority pursuant to the specific language of the Hague Convention. *Id.*

Because the purpose of the Hague Convention is to "ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation," we are not persuaded that the drafters did not intend what they wrote, particularly where the Hague Convention describes other methods of service. *See Nuovo,* 310 F.3d at 385. Specifically, articles 2 through 7 provide for service of process through a central authority and, under articles 8 and 9, through diplomatic channels. "It is unlikely that the drafters would have put in place these methods of service ... while simultaneously permitting the uncertainties of service by mail." *Id.*

**4 Further, other federal district courts in Texas which considered whether service of process by mail, under article 10(a) as involved here, or under article 5 which allows service through a central authority, have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention. *See Duarte v. Michelin N. Am., Inc.,* No. 2:13–CV–00050, 2013 WL 2289942, at *4–6 (S.D.Tex.2013) (considering question of service by mail on the secretary of state and determining, following *Nuovo,* that service by mail not authorized under the Hague Convention) (citing *Berezowsky v. Ojeda,* No.

4:12–CV–03496, 2013 WL 150714, at *7 (S.D.Tex.2013) (holding service was not effectuated under articles 2–5 which allows service of process under the Hague Convention through Mexico's Central Authority, demonstrating court's adherence to the specific meaning of the words used in the Hague Convention); *L.K. v. Mazda Motor Corp.*, No. 3:09–cv–469–M, 2009 WL 1033334, at *2 (N.D.Tex.2009) (holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met); *Albo v. Suzuki Motor Corp.*, No. 3:08–0139–KC, 2008 WL 2783508, at *2 (W.D.Tex.2008) (holding service not effective because, under article 5, the Hague Convention required full translation of documents into Japanese and without complying with specific Hague Convention requirements, service was insufficient)).

Further, in addition to *Wuxi*, two other state courts have considered whether the specific words used in the Hague Convention have specific meanings regarding service *34 of process or sending of judicial documents. *See In re J.P.L.*, 359 S.W.3d 695, 706 (Tex.App.–San Antonio, 2011, pet. denied) (holding that service of process in a child custody matter must be accomplished through the provisions of the Hague Convention and service on the Central Authority in Mexico); *Velasco v. Ayala*, 312 S.W.3d 783, 794 (Tex.App.–Houston [1st Dist.] 2009, no pet.) (relying on article 10(a) and *Nuovo* and concluding that service of process must be accomplished pursuant to the requirements of the Hague Convention).

In sum, we conclude the specific provisions set forth in the Hague Convention govern service, whether through article 5 and its reliance on a central authority, or on the

language expressed in article 10(a).

For these reasons, we sustain appellant's four issues, reverse the trial court's default judgment and permanent injunction against Tara Menon, and remand for further proceedings consistent with this opinion.

(Christopher, J., dissenting).

Tracy Christopher, Justice, dissenting.

The only question that appellant Tara Menon presents for our review is whether service by mail to a defendant in Canada is permitted under Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Service Convention").[1] The majority concludes that it is not.[2] In reaching this result, the majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention. I accordingly would affirm.

[1] *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[2] *But see Cook v. Toidze,* 950 F.Supp.2d 386, 394 (D.Conn.2013) ("[S]ervice by regular mail is proper under the Hague Convention where the party served is a resident of Canada."); *Mitchell v. Theriault,* 516 F.Supp.2d 450, 455 (M.D.Pa.2007) (holding that service of process by mail on a resident of Québec is not prohibited by the Service Convention); *Heredia v.*

Transp. S.A.S., Inc., 101 F.Supp.2d 158, 161 (S.D.N.Y.2000) ("[S]ervice by registered mail in Quebec is adequate service under the Convention."); *Randolph v. Hendry,* 50 F.Supp.2d 572, 578 (S.D.W.Va.1999) ("Because Canada does not object to service by postal channels, service of process by mail is authorized in this case."); *Taft v. Moreau,* 177 F.R.D. 201, 204 (D.Vt.1997) ("Plaintiffs' use of registered mail, return receipt requested, to transmit the summons and complaint [to defendants in Québec] was in compliance with the Hague Convention."); *Cantara v. Peeler,* 267 A.D.2d 997, 701 N.Y.S.2d 556, 557 (1999) (holding that Article 10(a) permits service by mail upon residents of Canada because Canada has not objected to service through postal channels).

I. ISSUES PRESENTED

**5 It is unnecessary to detail the facts in this case, because although Menon's brief lists four issues, she has presented only a single narrow question of law. That question is presented in her third issue, in which she asks, "Did the drafters of the Hague Service Convention intend for the word 'send' contained in Article 10(a) to mean 'serve'?" She restates the question in her fourth issue, asking, "May a litigant serve a Canadian citizen and resident of Québec with process in a Texas civil proceeding (bypassing traditional diplomatic channels and the Central Authority under the Hague Service Convention) by sending *35 citation directly to the Canadian citizen ... by mail, private delivery service, or e-mail?"

Menon's first two issues do not raise any other questions. Her briefing of her first stated issue ("Did the

trial court err in denying the motion for new trial and refusing to set aside the default judgment?") contains no argument, but instead consists solely of an introduction and a single statement, with citations, regarding the standard of review.[3] In her second issue, she asks, "Can state law provide a procedure for service of process in foreign nations that does not comport with traditional international law (e.g. letters rogatory) or the Hague Service Convention?" As stated, this issue begs the question of whether service by mail comports with the Service Convention.

[3] *See* TEX.R. APP. P. 38.1(i); *Archer v. DDK Holdings LLC,* 463 S.W.3d.597, 603 (Tex.App.–Houston [14th Dist.] 2015, no pet.) (where appellants stated an issue challenging the judgment and the trial court's findings on two grounds, but only briefed one ground, they waived appellate review of the unbriefed ground).

Menon has not briefed any other grounds for reversing the trial court's denial of her motion for new trial or setting aside the default judgment. 1 *See* TEX. R. CIV. P. 108a(1)(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made ... pursuant to the terms and provisions of any applicable treaty or convention...."). But, before reaching this question, it is first necessary to clarify the standard of review.

II. STANDARD OF REVIEW

We review the trial court's ruling on a motion for new trial for abuse of discretion, but "abuse of discretion" means different things in different contexts. *See Schuring v. Fosters Mill Vill. Cmty. Ass'n,* 396 S.W.3d 73, 76 (Tex.App.–Houston [14th Dist.] 2013, pet. denied). Here, the relevant facts are undisputed, and

Menon moved for a new trial on the ground that Article 10(a) of the Service Convention does not permit service by mail. We accordingly are presented only with a question of law, not with a matter within the trial court's discretion. *See Walker v. Packer,* 827 S.W.2d 833, 840 (Tex.1992) (orig. proceeding) ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts."). Courts review questions of law de novo. *Pinnacle Premier Props., Inc. v. Breton,* 447 S.W.3d 558, 563 (Tex.App.–Houston [14th Dist.] 2014, no pet.) (sub.op.).

III. GOVERNING LAW

In this country, there are at least two competing lines of authority interpreting Article 10(a) of the Service Convention. The prevailing view holds that Article 10(a) permits service by mail. *See, e.g., Brockmeyer v. May,* 383 F.3d 798 (9th Cir.2004); *Research Sys. Corp. v. IPSOS Publicité,* 276 F.3d 914 (7th Cir.2002); *Koehler v. Dodwell,* 152 F.3d 304 (4th Cir.1998); *Ackermann v. Levine,* 788 F.2d 830 (2d Cir.1986). The countervailing view holds that Article 10(a) does not permit service by mail. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374 (5th Cir.2002); *Bankston v. Toyota Motor Corp.,* 889 F.2d 172 (8th Cir.1989). This provision had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent ***36** for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp. v. Williams,* 868 S.W.2d 294, 296 (Tex.1993) (per curiam) (explaining that Texas courts "are *obligated* to follow only higher Texas courts and the United States Supreme Court").

**6 Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, there is binding precedent that tells us how to find that answer for ourselves. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles. *See Life Partners, Inc. v. Arnold,* 464 S.W.3d 660, 670 (Tex.2015) ("We have described the Supreme Court's decisions in some detail here, however, because in addition to providing the relevant test, they also describe the proper *approach* to the term's construction.").

A. Principles of Treaty Construction

In construing Article 10(a) of the Service Convention, this court is bound by the following principles.

1. A treaty is not legislation. *See Lozano v. Montoya Alvarez,* ——U.S. ——, 134 S.Ct. 1224, 1232–33, 188 L.Ed.2d 200, (2014) (" 'A treaty is in its nature a contract between ... nations, not a legislative act.' " (quoting *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829))); *id.* at 1233 ("[I]n their nature treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make ...." (quoting 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson))).

2. A treaty is not construed in the same way as legislation. *See id.* at 1233 ("That distinction [between a legislative act and a contract] has been reflected in the way we interpret treaties."); *Nielsen v. Johnson,* 279 U.S. 47, 51, 49 S.Ct. 223, 73 L.Ed. 607 (1929) ("The

narrow and restricted interpretation of the treaty ..., while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties.").

3. A treaty instead is construed in the manner of a contract. *See Lozano,* 134 S.Ct. at 1232–33; *see also BG Grp., PLC v. Republic of Argentina,* ——U.S. ——, 134 S.Ct. 1198, 1208, 188 L.Ed.2d 220 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Santovincenzo v. Egan,* 284 U.S. 30, 40 & n. 2, 52 S.Ct. 81, 76 L.Ed. 151 (1931) ("[T]reaties are contracts between independent nations....").

4. A treaty, however, is construed more liberally than a private contract. *See Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431, 63 S.Ct. 672, 87 L.Ed. 877 (1943) ("[T]reaties are construed more liberally than private agreements ...."); *see also Valentine v. United States ex rel. Neidecker,* 299 U.S. 5, 10, 57 S.Ct. 100, 81 L.Ed. 5 (1936) ("[T]reaties should be liberally construed so as to give effect to the apparent intention of the parties."); *Factor v. Laubenheimer,* 290 U.S. 276, 293–94, 54 S.Ct. 191, 78 L.Ed. 315 (1933) (explaining that "[c]onsiderations which should govern the diplomatic relations between nations, and the good faith of treaties" require that "if a treaty fairly admits of two constructions, one restricting the *37 rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred"); *Todok v. Union State Bank of Harvard, Neb.,* 281 U.S. 449, 454, 50 S.Ct. 363, 74 L.Ed. 956 (1930) (explaining that it is a

"fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose").

5. Such a liberal construction is required to secure equality and reciprocity between the signatories. *See Factor,* 290 U.S. at 293, 54 S.Ct. 191 (explaining that treaties are "liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Jordan v. K. Tashiro,* 278 U.S. 123, 127, 49 S.Ct. 47, 73 L.Ed. 214 (1928) (same); *see also Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 80 (Tex.2000) ("As treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it." (citing *Asakura v. City of Seattle,* 265 U.S. 332, 342, 44 S.Ct. 515, 68 L.Ed. 1041 (1924)).

B. Steps in Applying the Principles of Treaty Construction

**7 As the foregoing principles show, we are required to construe a treaty more liberally than a private contract to implement the apparent intention of the parties to secure equality and reciprocity between them. And although the construction of a treaty begins with its text, we are not permitted to end the inquiry there. *See, e.g., Abbott v. Abbott,* 560 U.S. 1, 9–10, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010) ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of 'rights of custody' in courts of other contracting states; and the purposes of the Convention."); *Choctaw Nation,* 318 U.S. at 431–32, 63 S.Ct. 672 ("[T]o ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted

by the parties." (citing *Factor,* 290 U.S. at 294, 295, 54 S.Ct. 191)).

As a practical matter, then, how do we apply the principles that govern treaty construction? To answer this question, I would again look to the precepts set forth by the United States Supreme Court. *See Life Partners, Inc.,* 464 S.W.3d at 670.

1. Identify the Treaty's Purpose.

The text must be read "with a view to making effective the purposes of the high contracting parties." *Sullivan v. Kidd,* 254 U.S. 433, 439, 41 S.Ct. 158, 65 L.Ed. 344 (1921); *see also El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 169, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999) (identifying a treaty's "cardinal purpose"). The treaty's purpose may be expressly stated in its preamble, *see Tseng,* 525 U.S. at 169, 119 S.Ct. 662, and the role played by a specific provision may be gleaned from the treaty's structure and the context in which the provision appears. *See Olympic Airways v. Husain,* 540 U.S. 644, 650, 124 S.Ct. 1221, 157 L.Ed.2d 1146 (2004) (noting that the Court considers the treaty's "text, structure, and history"); *Tseng,* 525 U.S. at 169, 119 S.Ct. 662 (identifying the treaty interpretation that "is most faithful to the Convention's text, purpose, and overall structure"); *Santovincenzo,* 284 U.S. at 37, 52 S.Ct. 81 (considering "the context of the provision in question").

2. Identify the signatories' shared expectations.

The treaty must be read "in a manner 'consistent with the shared expectations of the contracting parties.' " *Lozano,* 134 S.Ct. at 1233 (quoting *Husain,* 540 U.S. at 650, 124 S.Ct. 1221); *Tseng,* 525 U.S. at 167, 119 S.Ct. 662 (same); *Air France v. Saks,* 470 U.S. 392, 399, 105

S.Ct. 1338, 84 L.Ed.2d 289 (1985) *38 ("[I]t is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223–25, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996) (rejecting the petitioners' interpretation of a phrase as "implausible" and "unlikely" in view of "the shared expectations of the contracting parties," and instead concluding that "an equally plausible reading ... that leads to a more comprehensible result" was the only "realistic" alternative). Adherence to the parties' shared expectations is required because—unlike legislation—a treaty is "necessarily the product of consensus." Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 Geo. L.J. 1885, 1923 (2005). "Contrary to the majoritarian premise of statutory adoption, there is no means of imposing treaty obligations on a dissenting minority. If the product of negotiations is not satisfactory, a disaffected nation may simply not ratify the treaty." *Id.*

It therefore is no surprise that to identify those shared expectations, courts must consider the treaty's negotiating and drafting history. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 507, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008); *Tseng*, 525 U.S. at 167, 119 S.Ct. 662; *Zicherman*, 516 U.S. at 226, 116 S.Ct. 629; *Choctaw Nation*, 318 U.S. at 431–32, 63 S.Ct. 672; *Factor*, 290 U.S. at 294–95, 54 S.Ct. 191; *Nielsen*, 279 U.S. at 52, 49 S.Ct. 223. The construction of the Service Convention is no exception to this rule. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988) (examining the Service Convention's drafting history and negotiations).

**8 To understand a treaty's negotiating and drafting history, its provisions must be considered in the language used by the drafters in the official text. *See Zicherman,* 516 U.S. at 221, 116 S.Ct. 629 (considering the meaning of the French word *dommage* where the official text of the treaty was in French, and rejecting the contention "that we simply look to English dictionary definitions of 'damage' and apply that term's 'plain meaning' "); *Saks,* 470 U.S. at 399, 105 S.Ct. 1338 ("We look to the French legal meaning for guidance as to [the signatories' shared] expectations because the Warsaw Convention was drafted in French by continental jurists."); *Todok,* 281 U.S. at 454, 50 S.Ct. 363 ("The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling."). Where the official text of the treaty was drawn up in two languages, then courts consider both languages when analyzing the parties' shared expectations. *See United States v. Percheman,* 32 U.S. (7 Pet.) 51, 88–89, 8 L.Ed. 604 (1833) (where a treaty was drawn up in both Spanish and English, the Court considered the text in both languages, explaining that "[n]o violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other").

The Service Convention was drafted "in the English and French languages, both texts being equally authentic." *Schlunk,* 486 U.S. at 699, 108 S.Ct. 2104; *see also* Service Convention, *supra* note 1, at closing paragraph (stating that the Service Convention was drafted "in the English and French languages, both texts being equally authentic, in a single copy"). Thus, the negotiating and drafting history of the Service Convention's text in both languages must be considered. *See Schlunk,* 486 U.S. at

700–01, 108 S.Ct. 2104 (considering French terms that were proposed for inclusion in the Service Convention and comparing the meanings given to the terms "in some countries, such as *39 France" and "in others, such as the United States"). This negotiating and drafting history may be documented by the conference's rapporteur. *See United States v. Louisiana,* 394 U.S. 11, 43, 89 S.Ct. 773, 22 L.Ed.2d 44 (1969).

In addition to considering the text itself, courts consider the way in which the text was interpreted by the delegates involved in negotiating and drafting the treaty. *See Schlunk,* 486 U.S. at 703, 108 S.Ct. 2104 (considering statements and articles by Philip Amram, the head of the United States delegation to the Convention); *id.* at 709–10 & n.1, 714, 716, 108 S.Ct. 2104 (Brennan, J., concurring) (same). The delegates' views also may be memorialized by the conference rapporteur. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court,* 482 U.S. 522, 530 n. 13, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).

3. Accord "great weight" to the Executive Branch's interpretation.

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.' " *Abbott,* 560 U.S. at 15, 130 S.Ct. 1983 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176, 185, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982)); *Medellín,* 552 U.S. at 513, 128 S.Ct. 1346 (same); *Tseng,* 525 U.S. at 168, 119 S.Ct. 662 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

4. Accord "considerable weight" to the interpretation of the other signatories.

Finally, the parties' shared expectations are shown by their post-ratification understanding and conduct. *See Medellín,* 552 U.S. at 507, 128 S.Ct. 1346; *Husain,* 540 U.S. at 649–50, 124 S.Ct. 1221; *Tseng,* 525 U.S. at 167, 119 S.Ct. 662; *Zicherman,* 516 U.S. at 227, 116 S.Ct. 629; *see also O'Connor v. United States,* 479 U.S. 27, 33, 107 S.Ct. 347, 93 L.Ed.2d 206 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."). These may be documented in an organizational handbook or report. *See Sale v. Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 182 n. 40, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (quoting Office of United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979)). The United States Supreme Court instructs us that, when interpreting a treaty, " '[t]he opinions of our sister signatories ... are entitled to considerable weight.' " *Abbott,* 560 U.S. at 16, 130 S.Ct. 1983 (*Tseng,* 525 U.S. at 176, 119 S.Ct. 662); *Saks,* 470 U.S. at 404, 105 S.Ct. 1338 (same).

5. Consider the analysis of scholars.

**9 *See Abbott,* 560 U.S. at 18, 130 S.Ct. 1983 ("Scholars agree that there is an emerging international consensus on the matter.").

IV. APPLICATION

Having identified the governing precepts in the construction of treaties and the way in which they are applied, I would pursue the same approach in this case.

A. The Service Convention's Purpose

The Service Convention's two purposes are stated in its

preamble:

> The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organisation of mutual judicial assistance *for that* *40 *purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions

Service Convention, *supra* note 1, at preamble (emphasis added); *see also Schlunk*, 486 U.S. at 702–04, 108 S.Ct. 2104 (looking to the Service Convention's preamble for the identification of its purpose). Consistent with those purposes, the Service Convention's scope is set forth in Article 1: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." Service Convention, *supra* note 1, at Art. 1 (emphasis added).

This is a more specific purpose than that found by the majority in this case. By agreeing with Menon's argument that "she was not served pursuant to the Hague Convention service of process provisions,"[4] the majority necessarily has concluded that there are *non-service* provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 "eliminate[d]

the possibility" that the Service Convention could apply to transmissions abroad "that do not culminate in service":

> The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad. [3 1964 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 65 (1965) (3 Actes et Documents)] ("La présente Convention est applicable dans tous les cas où il y a lieu *de transmettre ou de notifier* un acte judiciaire ou extrajudiciaire en matière civile ou commerciale à une personne se trouvant à l'étranger") (emphasis added). To be more precise, the delegates decided to add a form of the juridical term "signification" (service), which has a narrower meaning than "notification" in some countries, such as France, and the identical meaning in others, such as the United States. *Id.*, at 152–153, 155, 159, 366. *The delegates also criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. Id., at 165–167. The final text of Article 1, supra, eliminates this possibility and applies only to documents transmitted for service abroad. The final report (Rapport Explicatif) confirms that the Convention* does not use more general terms, such as delivery or transmission, to define its scope because it *applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended. Id.*, at 366.

**10 *Schlunk*, 486 U.S. at 700–01, 108 S.Ct. 2104 (emphasis added).

[4] *Ante*, at ——

In accordance with the United States Supreme Court's analysis, I would conclude that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to "send[ing] judicial documents" means "serv[ing] judicial documents." Service Convention, *supra* note 1, at Art. 10(a).

*41 **B. The Shared Expectations of the Signatories to the Service Convention**

To ascertain the parties' shared expectations, I would consider the actual and proposed language of Service Convention's bilingual text, its negotiating and drafting history, and the understanding of the delegates.

1. Negotiating and Drafting History of the Text

In addition to the text and the negotiating and drafting history previously described, I would give considerable weight to the fact that "[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail." *See* Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 Or. Rev. Int'l L. 283, 333 (2010).

I additionally would consider the following history:

> The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service

is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."[5]

[5]Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,* 12 PACE L.REV. 177, 186 n.67 (1992) (translated from 3 Actes et Documents de la Dixième Session (Conférence de la Haye de Droit International Privé) 90 (1964)).

If Article 10(a) was considered to include service by telegram, and not to be "limited to registered mail," then it cannot be said, as the majority now holds, that this provision does not permit service by mail.

2. The Understanding of the Delegates

I next would consider the statements of Philip W. Amram, a member of the United States delegation to the Hague Conference that drafted the Service Convention. Indeed, in his concurring opinion in *Schlunk,* Justice Brennan identified Amram as "[t]he head of the delegation" and its "chief negotiator." *Schlunk,* 486 U.S. at 710, 714 (Brennan, J., concurring). Amram also was the only English-speaking member of the Service Convention's drafting committee. *See* Eshleman & Wolaver, *supra,* at 325 (citing Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7–28, 1964, 52 Dep't State Bull. 265, 265–66 (1965)). Amram "told the Senate Foreign Relations Committee that 'unless the requested State objects, direct service by mail' was allowed under Article 10 and 'use of the

central authority is not obligatory.' " *Id.* at 325–26 (footnotes omitted).

**11 Because the United States Supreme Court cited Amram's statement to the Senate in the Court's only opinion construing the Service Convention, *see Schlunk,* 486 U.S. at 703, 108 S.Ct. 2104, I would consider this statement in ascertaining the signatories' shared expectations. *See also* Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad,* 51 A.B.A. J. 650, 653 (1965) ("Article 10 permits direct service by mail ... unless [the receiving] state objects to such service.").

***42 C. The Executive Branch's Interpretation of Article 10(a)**

The Executive Branch has unwaveringly maintained that Article 10(a) permits service by mail. "Dean Rusk, the American secretary of state at the time the convention was negotiated, signed, and ratified, stated in his official report to President Johnson: 'Article 10 permits direct service by mail ... unless [the receiving] state objects to such service.' " Eshleman & Wolaver, *supra,* at 325. The State Department subsequently produced a circular stating that unless a nation " 'has made a specific reservation ... objecting to service by registered mail ... [service] may be made by international registered mail.' " *Id.* (citing U.S. Dep't of State, Bureau of Consular Affairs, Overseas Citizen Services, Office of Citizen Consular Services, Service of Legal Documents Abroad, *excerpted in* Judicial Assistance: Service: International Registered Mail, [2] 1981–1988 Digest § 6, at 1441–45). And, when the first federal appellate court held to the contrary, "the State Department formally said the ... ruling was wrong ... [in

suggesting] that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country.'" *Id.* at 326 (citing Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1991), *excerpted in United States Department of State Opinion Regarding the* Bankston *Case and Service by Mail to Japan Under Hague Service Convention,* 30 I.L.M. 260, 261 (1991)).[6]

[6]Kreczco's name actually is spelled "Kreczko"; his title was Deputy Legal Adviser; and the referenced letter was dated Mar. 14, 1990.

Regarding the specific application of Article 10(a) in this case, the State Department's website shows its view that Canada accepts "service of process by mail."[7]

[7]U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Country Information: Canada,* TRAVEL.STATE.GOV, http://travel. state.gov/content/travel/english/legal-considerations/judicial /country/canada.html (last visited June 26, 2015) (parentheses added).

In accordance with the instructions from the United States Supreme Court, I would give such views "great weight."

D. The Interpretation of Article 10(a) by Other Signatories

The post-ratification understanding of the parties can be seen in a Hague Conference report on the signatories' response to the following question:

Question D: Have there been any court decisions in

your country interpreting Article 10(a) of the Hague Service Convention which reads as follows:

"Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents by postal channels directly to persons abroad ..."

**12 [Answer] It was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a) in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America in opinions cited in the "Checklist" had concluded that service of process abroad *43 by mail was not permitted under the Convention.[8]

[8]PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 4–5 (Apr. 1989), *available at* http://www.hcch.net/upload/scrpt89e_20.pdf (italics omitted).

The significance of this unanimity in the interpretation of a convention that has now existed for fifty years and has been signed or ratified by sixty-eight countries cannot be overstated, because as our highest court has

explained, the judiciary's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty ... agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Avagliano,* 457 U.S. at 184–85, 102 S.Ct. 2374.

Despite a diligent search, I have found no authority that our fellow signatories have interpreted Article 10(a) to pertain only to the "sending" of documents and not to the "service" of documents. Because the required "extraordinarily strong contrary evidence" is lacking, I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail. *See Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 259, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984) ("We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence." (referring to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502)); *see also In re Morgan Stanley & Co.,* 293 S.W.3d 182, 189–90 (Tex.2009) (orig. proceeding) (rejecting the Fifth Circuit's interpretation on a question of law "[g]iven the overwhelming weight of authority" reaching a contrary result).

E. The Interpretation of Article 10(a) by Leading Scholars

I also would follow the example of the United States Supreme Court in consulting the writings of Bruno Ristau as to the intentions of the Service Convention's

drafters. *See Schlunk,* 486 U.S. at 698, 700, 703, 108 S.Ct. 2104 (citing 1 B. Ristau, International Judicial Assistance (Civil and Commercial) (1984 and 1 Supp.1986)). Like all of our sister signatories and our own government, Ristau states that Article 10(a) permits service by mail:

> Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that ... every participant in the debates concerning Article 10(a) ... understood the provision as referring to ... the use of postal channels for the purpose of service." Another analysis said "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention ... believe that to be the case."
>
> **13 Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object."

Eshleman & Wolaver, *supra,* at 331–32 (footnotes omitted).

*44 Based on all of the foregoing, I would conclude that Article 10(a) of the Service Convention permits service by mail.

V. THE COUNTERVAILING VIEW

The majority concludes that "the better-reasoned approach" is to follow the countervailing view espoused by the Fifth Circuit in *Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374 (5th Cir.2002). The

majority, however, has not explained why an approach that eschews the principles of treaty construction laid down by the United States Supreme Court is "better-reasoned," or even how those following the prevailing view have arrived at a different result.

The majority's opinion constitutes binding precedent on this court until it is overruled by a higher court or by our own court, whether in response to a motion for rehearing or for rehearing en banc or in a different case. And because it is binding, I believe it is important for the analysis to be transparent. This is especially so in this case, given that the majority adopts an interpretation contrary to that of the American delegation, the American government, most American courts, and those of our sister signatories—including, as the majority admits, Canada.[9] I accordingly have applied the governing precepts to illustrate how they necessarily lead to the conclusion that Article 10(a) of the Service Convention permits service by mail. Respectfully, I believe that the majority's differing analysis, like the analyses in the cases on which it relies, is flawed.

[9] *Ante,* at, —— n.1; *see also* Hague Conference on Private Int'l Law, List of Central Authorities Designated by Canada, HCCH, 6, *http://www.hcch.net/upload/authl4ca20 14en.pdf* (list up-to-date as of August 2014) (identifying the Ministère de la Justice as the Central Authority for Québec and identifying that office's website). On that website, Québec's Central Authority states, "The Convention also sets out other methods of transmitting documents that do not require processing through a Central Authority [including] postal service.... Under the Convention, a State may object to those methods

although Canada did not declare any opposition when it ratified the Convention." Gouvernement du Québec, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Other Methods of Transmission,* JUSTICE QUÉBEC, http://www.justice.gouv.qc.ca/english/programmes/sneaie/transmission-a.htm (last updated Feb. 26, 2004).

A. The Majority's Adoption of the Reasoning of *Nuovo Pignone*

As previously explained, the first precept of treaty construction is that a treaty is not construed as legislation, but instead is construed more liberally than a private contract, drawing on a wide variety of sources in order to implement the signatories' shared expectations. In *Nuovo Pignone,* however, the Fifth Circuit did the opposite. As the court stated it,

> We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail. In doing so, we rely on the canons of statutory interpretation rather than the fickle *presumption* that the drafters' use of the word "send" was a mere oversight. "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not *presume* that the drafters intended to give the same meaning to "send" that they intended to give to "service."

**14 *45 *Id.* at 384 (emphasis added). Thus, the Fifth

Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. *But see* Eshleman & Wolaver, *supra,* at 333–34 (discussing use of the same language in the Conventions of 1954, 1905, and 1896, all of which used the French word translated as "send" in referring to service of process by mail).

This approach follows none of the governing precepts of treaty construction. The majority in this case, like the authors of the cases on which the majority relies, instead have followed a canon of statutory interpretation, despite the United States Supreme Court's contrary directive in a case decided just last year. *See Lozano,* 134 S.Ct. at 1232–33 ("The Hague Convention ... is a treaty, not a federal statute.... 'A treaty is in its nature a contract between ... nations, not a legislative act.' ... That distinction has been reflected in the way we interpret treaties. It is our 'responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties.") (citations and internal quotations omitted, emphasis in original). The majority in this case neither treats the United States Supreme Court's discussion of how a Hague Convention is to be construed as binding precedent, nor explains its reasons for failing to do so. The majority instead follows *Nuovo Pignone,* in which the Fifth Circuit approached the question of treaty construction as though the only alternative to the application of "canons of statutory construction" was a "fickle presumption that the drafters' use of the word "send" was a mere oversight." *Nuovo Pignone,* 310 F.3d at 384. But, the drafters' intent is well-established without the need for a presumption. As previously explained, there is no dispute among the signatories

that Article 10(a) permits service by mail. Like the majority in this case, the *Nuovo Pignone* court did not even mention most of the precepts that govern treaty construction, or the fact that the Service Convention's predecessors dating back more than a hundred years used the word "send" even when referring to service of process by mail.

As reasons for rejecting the interpretation of Article 10(a) that is followed by all of the other Service Convention's signatories, the United States government, and a majority of courts in this country, the Fifth Circuit stated as follows:

> Nuovo Pignone's contention that the broad purpose of the Hague Convention is furthered if article 10(a) is interpreted to allow service by mail is problematic. As noted, the purpose of the Hague Convention is not only to simplify the service of process, but to ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation. Indeed, FED. R. CIV. P. 4(f)(1) presumes that the Hague Convention provides methods of service "reasonably calculated to give notice."
>
> We are not confident, nor should the drafters have been confident in 1967 [sic],[10] that mail service in the more than forty signatories [sic][11] is sufficient to *46 ensure this goal. [In an accompanying footnote, the court added, "Indeed, the advisory committee notes to the 1963 amendments to FED.R.CIV.P. 4 recognize that '[s]ervice of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service.'"] Under Nuovo Pignone's interpretation of article 10(a), the fact that a signatory could object to service by mail is

> unconvincing. There is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a).
>
> **15 Finally, we note that other provisions of the Hague Convention describe more reliable methods of effecting service. Service of process through a central authority under articles 2 through 7 and service through diplomatic channels under articles 8 and 9 require that service be effected through official government channels. It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.

Id. at 384–85 & n. 17. For several reasons, the stated rationale cannot withstand scrutiny.

[10]The Convention was not drafted in 1967; it was drafted in 1964. *See Schlunk,* 486 U.S. at 698, 108 S.Ct. 2104 ("The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law.").

[11]There were twenty-three member States when the Service Convention was drafted. *See Schlunk,* 486 U.S. at 698, 108 S.Ct. 2104 ("Representatives of all 23 countries that were members of the Conference approved the Convention without reservation."); Kurt H. Nadelmann & Willis L. M. Reese, *The Tenth Session of the Hague Conference on Private International Law,* 13 AM. J. COMP. L. 612, 612 n.1 (1964) (listing the twenty-three member States when the Service Convention was drafted).

First, the Fifth Circuit implies that in the Federal Rules of Civil Procedure in effect when the Service Convention

was drafted, the advisory committee anticipated that service abroad *by mail* involved difficulties not present in domestic service. To the contrary, however, the advisory committee's only example of difficulties in service abroad was that "a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein."[12] The 1963 amendment to Federal Rule of Civil Procedure 4(i) was intended to ameliorate such difficulties by providing for five "alternative provisions for service in a foreign country"—including service by mail. *See Amendments to Rules of Civil Procedure for the U.S. Dist. Courts*, 31 F.R.D. 587, 595 (1963). That provision, "permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country."[13] The Fifth Circuit cites neither evidence nor authority for its contrary assumption.

[12]*See* ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 11 (July 18, 1962), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rulescivil-procedure-july-1962.

[13]ADVISORY COMM. ON CIVIL RULES, *supra* note 12, at 12.

Second, the court's statement that "[t]here is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a)" is contrary to the statutory textual analysis that the authoring court

purports to apply. Specifically, Article 21 of the Service Convention *requires* that "[e]ach Contracting State shall similarly inform the Ministry, where appropriate, of ... opposition to the use of methods of transmission pursuant to Articles 8 and 10." Service Convention, *supra* note 1, at Art. 21; *see also United States v. Caldera–Herrera,* 930 F.2d 409, 411 (5th Cir.1991) ("Where possible, statutes must be read in harmony with one another so as to give meaning to each provision." (citing *Fed. Aviation Admin. v. Robertson,* 422 U.S. 255, 261, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975))). Not only *47 must we presume that signatories that voluntarily chose to sign the agreement intended to comply with Article 21, but such compliance is objectively verifiable by the signatories' post-ratification conduct: approximately half of the Service Convention's signatories have either qualified their acceptance of Article 10 or have opposed it entirely.[14]

[14] *See* Hague Conference on Private Int'l Law, *Table Reflecting Applicability of Articles 8(2), 10(a),(b), and (c), 15(2) and 16(3) of the Hague Service Convention,* HCCH (Feb. 2013), http://www.hcch.net/upload/applicability14e.pdf.

**16 Third, the Fifth Circuit makes the unsupported assumption that the drafters would not have permitted service by mail when two "more reliable" methods of service (through a Central Authority and through diplomatic channels) were available. In doing so, the court assumes not only that mail is less reliable, but also that the drafters would not have included both a more reliable and a less reliable method. If this were true, however, then the drafters would have included only the single most reliable method of service, whether that was service through a Central Authority or service through

diplomatic channels, but not both. *But see* Philip W. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law,* 59 AM. J. INT'L L. 87, 90 (1965) ("Use of the Central Authority is purely optional with the applicant for service."). And if mail is presumed unreliable, then how are the service documents to be transmitted to a foreign Central Authority *without* the use of mail? *See* Service Convention, *supra* note 1, at Art. 2 ("Each Contracting State shall designate a Central Authority which will undertake to *receive requests for service coming from other Contracting States* ....) (emphasis added); *id.* at Art. 3 ("The authority or judicial officer competent under the law of the State in which the documents originate *shall forward to the Central Authority* of the State addressed a request conforming to the model annexed to the present Convention ....") (emphasis added). And how, without using mail, is the foreign Central Authority to communicate directly with the applicant as required? *See id.* at Art. 4 ("If the Central Authority considers that the request does not comply with the provisions of the present Convention *it shall promptly inform the applicant* and specify its objections to the request.") (emphasis added); *id.* at Art. 6 ("The Central Authority of the State addressed ... shall complete a certificate ... [stating] that the document has been served ... [or stating] the reasons which have prevented service. The certificate *shall be forwarded directly to the applicant.*") (emphasis added).

Because the Fifth Circuit in *Nuovo Pignone* did not apply the correct precepts of treaty construction but instead relied on unsupported assumptions, I would decline to follow it. The majority states that "other federal district courts in Texas ... have ruled

consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention."[15] But, *all* courts agree that if the Hague Service Convention applies, then service must be effectuated by a means permitted under the treaty's terms. As phrased, this statement begs the question of whether service by mail is permitted under Article 10(a). If the majority intended to suggest that federal district courts in the Fifth Circuit have consistently stated that Article 10(a) does not permit service by mail, then that implication is wrong. *See, e.g., Chattem Chems., Inc. v. Akzo Nobel Chems. B.V.*, 229 F.Supp.2d 555, 556 (M.D.La.2002) ("The Court, having *48 reviewed conflicting authorities, finds that service made pursuant to Article 10(a) comports with the purpose, meaning and intent of the Hague Convention."); *Brown v. Bandai Am., Inc.*, No. 3–01–CV–0442–R, 2002 WL 1285265, at *4 (N.D. Tex. June 4, 2002) ("[T]he Court determines that service of process by mail is permissible under Article 10(a) of the Hague Convention."); *Lafarge Corp. v. M/V MACEDONIA HELLAS*, No. Civ.A. 99–2648, 2000 WL 687708, at *11 (E.D.La. May 24, 2000) ("[T]his court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Friede & Goldman, Ltd. v. Gotaverken Arendal Consultants*, No. CIV A 99–1970, 2000 WL 288375, at *3 (E.D.La. Mar. 16, 2000) ("[T]his Court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Paradigm Entm't, Inc. v. Video Sys. Co.*, No. Civ.A. 3:99–CV–2004P, 2000 WL 251731, at *7 (N.D.Tex. Mar. 3, 2000) ("[T]his Court finds that Article 10(a) provides for service by mail in the current situation."); *Ortega Dominguez v. Pyrgia Shipping*

Corp., No. Civ.A. 98–529, 1998 WL 204798, at *2 (E.D.La. Apr. 24, 1998) ("[T]his Court finds that Artide 10(a) of the Hague Convention permits service of process by mail."); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F.Supp. 847, 851 (W.D.Tex.1988) ("Plaintiffs' service of process directly upon Dainichi–Japan by registered mail was sufficient to comport with Art. 10(a) of the Hague Convention."); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, Civ. A. Nos. 84–0105 & 84–5442, 1987 WL 4766, at *3 (E.D.La. Apr. 8, 1987) ("Mailing a summons and a copy of the complaint with a return receipt ... creates personal jurisdiction ... against a FSIA corporation [i.e, a corporation whose ownership is vested in a foreign state] ... in a Hague Service Convention state....").

[15] *Ante*, at ——.

**17 The majority cites several opinions that were issued by federal district courts in Texas after the Fifth Circuit Court of Appeals decided *Nuovo Pignone*, but these decisions add nothing to the discussion. The authoring courts had no choice but to follow *Nuovo Pignone*, because the opinion constitutes binding precedent over the lower courts in the Fifth Circuit. The distinction between a court that is merely following precedent and one that makes an independent determination of an issue can hardly be overemphasized: the Fifth Circuit's trial courts are *required* to treat the Fifth Circuit Court of Appeals' decisions as binding precedent, whereas Texas state courts—including this one—are *forbidden* to treat them as binding precedent. As the Texas Supreme Court has explained:

> The court of appeals' discussion of [a

> Fifth Circuit case] and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case.... By focusing so exclusively on [the Fifth Circuit case], the court of appeals overlooks the ... the weight of ... federal court decisions from other jurisdictions.

Penrod Drilling Corp., 868 S.W.2d at 296. The majority's failure to discuss the governing precepts of treaty construction or to address the reasoning of courts that have reached a conclusion contrary to that of the Fifth Circuit suggests that the majority has fallen into the same error here.[16]

[16]This is not the only problem with the majority's discussion of federal district court decisions. The only case that it cites for the proposition that the Service Convention does not permit service by mail is *Duarte v. Michelin North America, Inc.*, No. 2:13–CV–00050, 2013 WL 2289942 (S.D.Tex. May 23, 2013). The majority cites the remaining cases only in connection with articles of the Service Convention that are not at issue here. And although *Duarte* does indeed cite *Berezowsky v. Ojeda*, No. 4:12–CV–03496, 2013 WL 150714 (S.D.Tex. Jan. 14, 2013) that opinion has since been vacated. 765 F.3d 456 (5th Cir.2014).

The majority cites *L.K. v. Mazda Motor Corp.*, No. 3:09–cv–469–M, 2009 WL 1033334, at *2 (N.D.Tex. Apr. 15, 2009) with the parenthetical, "holding service under article 5 was not effective because Japanese

requirement that service be transmitted to the Central Authority was not met." That is not the case's holding. To the contrary, the authoring court did not analyze the adequacy of service at all, but said only that "Plaintiffs' counsel admits that he failed to comply with the requirements of the Hague Convention,"

Finally, the majority cites *Albo v. Suzuki Motor Corp.*, No. 3:08–0139–KC, 2008 WL 2783508 (W.D.Tex. July 2, 2008) with the parenthetical, "holding service not effective because, under article 5, the Hague [Service Convention] required full translation of documents into Japanese and without complying with specific Hague [Service Convention] requirements, service was insufficient." But as the authoring court explains, the Service Convention itself has no such requirement; it simply provides that " 'the Central Authority *may* require [the] document be written in, or translated into, the official language or one of the official languages of the State.' " *Id.* at *2 n.2 (quoting Service Convention, *supra* note 1, at Art. 5) (emphasis added).

*49 B. The Majority's Reliance on State Court Decisions

The majority's treatment of state court decisions appears to me to be similarly flawed. For example, the majority cites *Wuxi Taihu Tractor Co. v. York Group, Inc.*, stating that the authoring court "held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention."[17] If that were the court's holding, then the case would be merely inapposite, because only Article 10(a) is at issue in this case. But that was not the court's holding, as can be seen

from the fact that the *Wuxi Taihu* court *affirmed* the post-answer default against the foreign defendant. No. 01–13–00016–CV, 2014 WL 6792019, at *1 (Tex.App.–Houston [1st Dist.] Dec. 2, 2014, pet. pending) (mem.op.). In describing this as the court's holding, the majority fails to follow the standard for distinguishing between dicta and an alternative holding. *See State Farm Mut. Auto. Ins. Co. v. Lopez,* 156 S.W.3d 550, 554 (Tex.2004) (op. on reh'g) (granting petitioner's motion for rehearing because "we failed to apply the standard for distinguishing between alternative holdings and dicta"); *Tex. Natural Res. Conservation Comm'n v. White,* 46 S.W.3d 864, 868 (Tex.2001) (explaining that a court's statement is not dicta but instead is an alternative holding if "the court could have relied on either determination to reach its ultimate conclusion"). Moreover, the construction of Article 10(a)—the only issue presented for our review—is never mentioned in *Wuxi Taihu.* Indeed, the issue could not have arisen on the facts in that case, because the defective-service complaint in *Wuxi Taihu* concerned service in the People's Republic of China,[18] which—in accordance with Article 21 of the Service Convention—has formally declared its opposition to "the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention."[19] But *50 what the *Wuxi Taihu* court actually held was that, regardless of the appellant's claims of defective service, the appellant nevertheless "chose to answer, and it cannot now, after voluntarily appearing, avoid the consequences of its choice." *See Wuxi Taihu,* 2014 WL 6792019, at *10 n.6 (citing *Onda Enters., Inc. v. Pierce,* 750 S.W.2d 812, 813 (Tex.App.–Tyler 1988, orig. proceeding) (per curiam)). As a result, the entirety of the *Wuxi Taihu* court's discussion of the Service Convention

is dicta.

[17] *Ante,* at. ——

[18] *See Wuxi Taihu,* 2014 WL 6792019, at *1.

[19] A courtesy translation of that country's declarations are available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment=393=resdn (last visited June 26, 2015).

**18 The other Texas cases cited by the majority and decided by our sister courts also do not concern Article 10(a). *See In re J.P.L.,* 359 S.W.3d 695 (Tex.App.– San Antonio 2011, orig. proceeding [mand. denied]); *Velasco v. Ayala,* 312 S.W.3d 783 (Tex.App.–Houston [1st Dist.] 2009, no pet.).[20] As in *Wuxi Taihu,* the issue in *Velasco* and in *J.P.L.* concerned service of process in a country that has made a formal declaration of opposition to Article 10. Specifically, both *Velasco* and *J.P.L.* concerned service in Mexico.[21] Like the *Wuxi Taihu* opinion, the *Velasco* opinion cites Article 5 as authority for the proposition that service by mail does not comply with the Service Convention. *See Velasco,* 312 S.W.3d at 794. In *J.P.L.,* the authoring court interpreted Article 19 of the Service Convention. *See J.P.L.,* 359 S.W.3d at 707. Thus, in none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court. These cases accordingly add nothing to the majority's analysis—which make its failure to address the reasoning of the cases that actually do address that question and follow the prevailing view and all the more puzzling.

[20] *See ante,* at ——.

[21]A courtesy translation of Mexico's "declarations made at the moment of accession" is available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment=412=resdn (last visited June 26, 2015).

VI. CONCLUSION

For the reasons stated herein, I would conclude that Article 10(a) of the Service Convention permits service by mail in Canada. Because the majority does not, I respectfully dissent.

FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon
v. Water Splash, Inc.

Please be advised that on this date the court **DENIED APPELLEE'S** motion for rehearing en banc in the above cause.

T. C. Case # 13-CV-0205 Christopher Prine, Clerk

Jeremy Jason Gaston
Hawash Meade Gaston Neese & Cicack, LLP
2118 Smith Street
Houston, TX 77002
DELIVERED VIA E-MAIL

RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. *v.* MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. JEREMY J. GASTON
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* DELIVERED VIA E-MAIL *

RECORD
AND
BRIEF

No. 16-254

In The

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Texas, Fourteenth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether service by mail comports with the Hague Service Convention.

Whether Québec has adopted the Hague Service Convention so as to permit service of process via mail without going through Canadian and Quebecer government channels.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	3
I. Introduction	3
II. The independent ground upon which the trial court's default judgment should be reversed	6
III. The Texas court of appeals' holding that the Convention does not authorize service of process by mail is correct	10
Conclusion	16

TABLE OF AUTHORITIES

Page

CASES:

Ackerman v. Levine, 788 F.2d 830 (2d Cir. 1986) 5

Alaska v. United States, 545 U.S. 75 (2005) 11

Arco Elec. Control Ltd. v. Core Intern., 794 F. Supp. 1144 (S.D. Fla. 1992) 5

Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 37 (Mar. 31) 13

Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989) 4

Beard v. Greene, 523 U.S. 371 (1998) 7

Bond v. United States, 134 S.Ct. 2077 (2014) 7, 10

Brockmeyer v. May, 383 F.3d 798 (9th Cir. 2004) 5

Canada Attorney-General for Canada v. Attorney-General for Ontario, [1937] 1 D.L.R. 673 6

Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) 11

Factor v. Laubenheimer, 290 U.S. 276 (1933) 12

Geofroy v. Riggs, 133 U.S. 258 (1890) 12

Golub v. Isuzu Motors, 924 F. Supp. 324 (D. Mass 1996) 4

Honda Motor Co. v. Superior Court, 12 Cal. Rptr. 2d 861, 10 Cal. App. 4th 1043 (Cal.App.6th Dist.) 5

Kim v. Frank Mohn A/S, 909 F. Supp. 474 (S.D. Tex. 1995) 5

Koehler v. Dodwell, 152 F.3d 304 (4th Cir. 1998) 5

TABLE OF AUTHORITIES – Continued

Page

Lozano v. Montoya Alvarez, 134 S.Ct. 1224 (2014) 11

Mateo v. M/S KISO, 805 F. Supp. 792 (N.D. Cal. 1992) 5

Maximov v. United States, 373 U.S. 49 (1963) 12

Medíllin v. Texas, 552 U.S. 491 (2008) 7, 11

Menon v. Water Splash, Inc., 472 S.W.3d 28 (Tex. App. – Houston [14th Dist.] 2013) 1

Mommsen v. Toro Co., 108 F.R.D. 444 (S.D. Iowa 1985) 4

Nuovo Pignone v. Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002) 4

Olympic Airways v. Husain, 540 U.S. 644 (2004) 11

Ordnandy v. Lynn, 122 Misc. 2d 954, 472 N.Y.S.2d 274 (1984) 5

Pochop v. Toyota Motor Company, 111 F.R.D. 464 (S.D. Miss. 1986) 4

Postal v. Princess Cruises, Inc., 163 F.R.D. 497 (N.D. Tex. 1995) 4

Raffa v. Nissan Motor Co. Ltd., 141 F.R.D. 45 (E.D. Pa. 1991) 4

Research Sys. Corp. v. IPSO Publicite, 272 F.3d 914 (7th Cir. 2002) 5

Reynolds v. Koh, 490 N.Y.S.2d 295 (1985) 5

Riendeau v. St. Lawrence & Atlantic R. Co., 167 F.R.D. 26 (D. Vt. 1996) 4

TABLE OF AUTHORITIES – Continued

Page

Santovincenzo v. Egan, 284 U.S. 30 (1931) 12

Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987) 12

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982) 12

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) 7, 11

CONSTITUTION:

CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95 6

RULES:

CODE CIV. P. QUÉBEC, art. 138 8

§ 110-146 ..... 6, 8

§ 198.1 6

§ 484.1 6

Texas Rules of Appellate Procedure, Rule 53.4 9

OTHER AUTHORITIES:

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note (1987) 13

2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 218-219 (1966) 13

TABLE OF AUTHORITIES – Continued

Page

Brief for the United States as Amicus Curiae in Support of Vacatur and Remand, *BG Group PLC v. Republic of Arg.*, 134 S.Ct. 1198 (2014) 13

Brief for the United States as Amicus Curiae Supporting Petitioner, *Abbott v. Abbott*, 560 U.S. 1 (2010) 14

Brief for the United States as Amicus Curiae Supporting Respondents, *Sanchez-Llamas v. Johnson* (Nos. 05-51, 04-10566), 2006 WL 271823 14

Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3) 15

Gazette Officielle du Québec, April 20, 1988, 120th year, nr 16 6

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 1

art. 10(a) .....*passim*

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 (July 9) 13

TABLE OF AUTHORITIES – Continued

Page

RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) 13

S. EXEC. DOC. NO. 92-1 (1971) 13

VIENNA CONVENTION ON THE LAW OF TREATIES

1155 U.N.T.S. 331 12

art. 31(1) 14

art. 31(2) 14

art. 32 ..... 14, 15

STATEMENT OF THE CASE

When petitioner Water Splash, Inc. was unable to serve respondent Tara Menon (a Canadian citizen residing in Québec, Canada) with process, the trial court authorized alternative service by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." A default judgment was entered after Menon was served by the alternative service. Menon filed a motion for new trial wherein she argued that service by mail, Federal Express, or email does not comply with article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Convention"), and therefore, the default judgment should be set aside (CR 499-500). *See* art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. The trial court denied the motion and Menon appealed to the Fourteenth Court of Appeals in Houston, Texas.

In the court of appeals, Menon argued that the trial court's default judgment should be set aside because: (1) article 10(a) of the Convention does not allow for service of process by mail; and (2) the law of Québec, without implementing legislation, does not permit service of process by mail without going through Canadian and Quebecer government channels. The majority opinion of the court of appeals resolved the case under the first argument without addressing the second argument and held that "send" does not include "service of process" and reversed the default judgment. *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 32 (Tex. App. –

Houston [14th Dist.] 2013, pet. denied). The majority's reasoning is based on what it considered to be the unambiguous text of the Convention. In reaching this conclusion, the court of appeals acknowledged a split of authority across the United States regarding article 10(a) of the Convention with the following language:

> Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does not object. Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.
>
> We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service by mail.

Id. (footnotes omitted).

The dissenting opinion, in spite of the clear text of the Convention, would have relied on a variety of extra-textual sources to conclude that "send" includes "service of process" and thereby affirmed the default judgment. *Id.* at 36-39 (Christopher, J., dissenting).

Water Splash filed a motion for en banc reconsideration, and the court of appeals ordered Menon to respond. Menon again argued that the word "send" employed in the Convention does not mean "service of

process," and that the Convention, although adopted by Canada, has not been fully implemented by the province of Québec so as to effectuate service by mail on Menon without going through a Quebec judge or "*l'huisser*," and therefore, the service on Menon by mail was not effective. After the motion for en banc reconsideration was denied without opinion, Water Splash filed a petition for review in the Texas Supreme Court, and Menon was ordered to respond. In her response, Menon again argued that "send" does not mean "service of process," and that the Convention has not been fully implemented by Québec so as to effectuate service by mail on Menon without going through a Quebec judge or "*l'huisser.*" The Texas Supreme Court denied the petition for review without opinion.

Water Splash now argues in its petition for writ of certiorari that this case is a good vehicle to resolve the split of authority regarding whether the Convention authorizes service of process by mail.

REASONS FOR DENYING THE WRIT

I. Introduction.

The Convention provides a means through which parties to civil litigation may serve documents abroad. In this regard, article 10 of the Convention states:

> Provided the State of destination does not object, the present Convention shall not interfere with

> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect ***service*** of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination (emphasis added).

Of the many other courts throughout the United States that have considered the issue of whether article 10(a) authorizes service of process by mail, their opinions are split. One group of cases holds that article 10(a) does not permit service by mail, but merely provides for the mailing of non-service-related judicial documents. *See, e.g.*, *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989); *Riendeau v. St. Lawrence & Atlantic R. Co.*, 167 F.R.D. 26, 29 (D. Vt. 1996) (service in Québec); *Postal v. Princess Cruises, Inc.*, 163 F.R.D. 497, 499 (N.D. Tex. 1995); *Raffa v. Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Pochop v. Toyota Motor Company*, 111 F.R.D. 464, 466 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985); *Golub v. Isuzu Motors*, 924 F. Supp. 324, 327 (D. Mass 1996); *Kim v.*

Frank Mohn A/S, 909 F. Supp. 474, 479, and n. 4 (S.D. Tex. 1995); *Mateo v. M/S KISO*, 805 F. Supp. 792, 796-97 (N.D. Cal. 1992); *Arco Elec. Control Ltd. v. Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); *Honda Motor Co. v. Superior Court*, 12 Cal. Rptr. 2d 861, 861-84, 10 Cal. App. 4th 1043 (Cal.App.6th Dist.); *Reynolds v. Koh*, 490 N.Y.S.2d 295, 297 (1985); *Ordnandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274, 274-75 (1984).

Another group of cases hold that service under article 10(a) may be made by mail. *Brockmeyer v. May*, 383 F.3d 798, 808-09 (9th Cir. 2004); *Research Sys. Corp. v. IPSO Publicite*, 272 F.3d 914, 916 (7th Cir. 2002); *Koehler v. Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986). The Texas court of appeals in this case joins the courts holding that article 10(a) of the Convention does not permit service by mail, but merely provides for the mailing of non-service-related judicial documents.

At some point, this Court should resolve this split of authorities, but it is suggested that this case is not a good vehicle for doing so because (1) there is an independent ground that was argued throughout the lower court proceedings by Menon and that was not reached by the Texas court of appeals or the Texas Supreme Court upon which the trial court's default judgment should be reversed, and (2) the court of appeals' holding that the Convention does not permit service by mail was correct.

II. The independent ground upon which the trial court's default judgment should be reversed.

Under the Convention, Article 10(a) does not apply where the State of designation objects. In this case, Menon was served in Québec, Canada. Under Canadian law, each province has authority to adopt international treaties such as the Convention. CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95; *Canada Attorney-General for Canada v. Attorney-General for Ontario*, [1937] 1 D.L.R. 673. Canada ratified the Convention and Québec issued on March 30, 1988, a Decree nr 491-88, in which it declared itself bound by the Convention. *See* Gazette Officielle du Québec, April 20, 1988, 120th year, nr 16. Relevant sections of the Québec Code of Civil Procedure (§§ 110-146, 198.1 & 484.1) have been amended to give effect to the Convention. *See* in particular § 136. However, service of process in Québec can be done validly only by using an official process server (*l'huisser*) who then attests that the service has been effected, or by permission of a judge in Québec. *See id.* at §§ 120 & 123. Such a server (*l'huisser*) can be hired by the foreign applicant (that is, Water Splash) directly or by the Québec Department of Justice on the request of a foreign "central authority" in the country of the applicant, following the procedure set forth in the Convention. Therefore, whether service of process by mail is permitted by the Convention or not, and whether Canada objects to it or not is secondary: such service has no legal effect in Québec.

And very importantly, under article 10(a) itself, whether the Convention is valid in the State of destination is governed by the law of the jurisdiction where the procedure takes place, which is that of Québec. In other words, although adopted by Canada, the Convention has not been fully implemented by the province of Québec so as to effectuate service by mail on Menon without going through a Québec judge or a *l'huisser*.

The question, then, is not whether Canada has approved of the Convention, but whether Québec has approved with legislation implementing the convention as required by the Canadian Constitution. Implementing legislation is a key issue regarding the enforceability of international law that has been frequently dealt with by the United States Supreme Court when confronted with cases, like this one, that must cross the preliminary bridge of whether the Convention is even the law of the forum in question. *See Bond v. United States*, 134 S.Ct. 2077, 2093 (2014); *Medíllin v. Texas*, 552 U.S. 491, 508 (2008); *Beard v. Greene*, 523 U.S. 371, 375 (1998) (per curiam); *Vokswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

All of the foregoing was repeatedly raised in the Texas appellate courts. Menon argued in the court of appeals and in the Texas Supreme Court that a litigant may not serve a Canadian citizen and resident of Québec with process by sending citation directly to the Canadian citizen (bypassing traditional diplomatic channels and the Central Authority under the Convention) by mail. In pursuing this issue throughout her

Appellant's Brief filed in the court of appals, Menon summarized at the end of the brief by stating the following:

> Therefore, service by mail, private delivery, and e-mail is not proper because: (1) under Article 138 of the Code of Civil Procedure of Québec because the alternative service in this case was not "obtained in the district of the place in which the written proceeding [was] served." CODE CIV. P. QUÉBEC, art. 138; (2) Quebec appears to have no implementing legislation regarding the Hague Service Convention as required by the Canadian Constitution, in which case, service must be by traditional diplomatic channels (e.g., letters rogatory); and (3) the possible administrative implementation of the Hague Service Convention by Québec as indicated by the Hague Conference website shows that Water Splash, Inc. failed to comply with the Québec regulations regarding service of process. Aplt's Br. at 31-32.

The majority opinion in the court of appeals did not reach or address this issue but rather resolved the appeal by concluding that the Convention does not authorize service by mail, thereby mooting the Québec implementation question. It makes sense that the Texas court would take this approach so as to avoid passing on the unfamiliar territory of Canadian and Quebecer law.

Menon further pursued this point in the Texas Supreme Court by arguing that even if the Convention allows service by mail,

> then this Court should also *either* (1) address the additional question raised in Appellant's Brief but not addressed by the court of appeals regarding whether Québec has approved of the Convention with implementing legislation as required by the Canadian Constitution, *or* (2) remand to the court of appeals for consideration of this question under Rule 53.4 of the Texas Rules of Appellate Procedure.

Water Splash's argument on page 16 of its petition for writ of certiorari that the Canadian and Quebecer domestic law question "has no bearing on whether service of process was proper in this case" is not accurate. The very point of the argument is that it is an independent ground for reversing the trial court's default judgment. Additionally, Water Splash's argument, also on page 16 of its petition, that Menon "conceded that the only question at issue in this case was the federal question [of whether the Convention allows for service by mail] is also not accurate. Menon raised the issue at every level of the state court appellate proceedings. Moreover, the majority opinion specifically did not reach the argument, and therefore, it is an open question if this Court were to reverse the service-by-mail holding.

In short, there is an independent ground upon which Menon would have prevailed in the Texas court of appeals, and therefore, this case is not a good vehicle for addressing the split of authorities on whether the Convention authorizes service of process by mail.

III. The Texas court of appeals' holding that the Convention does not authorize service of process by mail is correct.

The primary thrust of the dissenting opinion of the Texas court of appeals and the authorities relied on by the dissent are that extra-textual sources indicate that the intent of the drafters of the Convention was to authorize service by mail. The majority opinion of the Texas court of appeals and the authorities relied on by the majority are that the clear text of the Convention indicates that the drafters did not intend to authorize service by mail. The United States Supreme Court has time and again said that the beginning point in the construction of a treaty is the text of the treaty itself, and that supplemental means of interpretation (that is, extra-textual sources) should be resorted to only if the ordinary meaning of the text presents an ambiguity or leads to an absurd result. Examples abound:

- *Bond v. United States*, 134 S.Ct. 2077, 2087-90 (2014) (analyzing the ordinary meaning of the term "chemical weapon" contained in the Chemical Weapons Convention and only after concluding that the term is ambiguous resorting to supplemental means of interpretation) and *id.* at 2094 & 2097 (Scalia, J., concurring in judgment) (interpreting a "chemical weapon" solely on the basis of a textual analysis and stating that the Court's other interpretive devices were "unintelligible").

- *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014) ("For treaties, which are primarily compacts between independent nations, our duty is to ascertain the intent of the parties by looking to the document's text and context.") (citations, brackets, and quotation marks omitted).

- *Medíllin v. Texas*, 552 U.S. 491, 508, 514 (2008) (applying a "time-honored textual approach," the Court found that the failure to use binding language such as "such" or "must" suggested the terms of the treaty created a political rather than a judicial commitment).

- *Alaska v. United States*, 545 U.S. 75, 92-96 (2005) (interpreting treaty term "bay" according to the ordinary meaning mariners apply to the term).

- *Olympic Airways v. Husain*, 540 U.S. 644, 655 (2004) (interpreting treaty terms "under the ordinary and usual definitions of these terms").

- *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (stating that negotiation history may be "consulted to elucidate a text that is ambiguous").

- *Vokswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) ("When interpreting a treaty, we 'begin with the text of the treaty and the context in which the written words are used.'") (quoting

Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 534 (1987) and *id.* at 700 ("Other general rules of construction may be brought to bear on difficult or ambiguous passages.").

- *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'") (quoting *Maximov v. United States*, 373 U.S. 49, 54 (1963)).

- *Factor v. Laubenheimer*, 290 U.S. 276 (1933) (resorting to supplemental means of construing a treaty only after it was clear that the text of the treaty gave rise to an ambiguity).

- *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("[a]s treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations'") (quoting *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890)).

Another important point that supports the majority opinion's text-first methodology is international law itself. The Vienna Convention on the Law of Treaties reflects the rules of customary international law applicable to construction of all treaties. VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331.

See RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) ("The International Court of Justice . . . has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties."). The Vienna Convention provides the accepted international framework for interpreting treaty provisions, and as the International Court of Justice has said, it reflects a codification of the customary international law applicable to all nations. *See Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 37 (Mar. 31); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 43 (July 9); *see also* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note, at 144-45 (1987) (discussing the Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention in the United States). The Vienna Convention was an attempt to "codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties." 2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 218-19 (1966). The United States has never ratified the Vienna Convention, but it recognizes the treaty as "the authoritative guide to current treaty law and practice." S. EXEC. DOC. NO. 92-1, at 1 (1971). Moreover, the United States routinely relies on the Vienna Convention in litigation before the United States Supreme Court.[1]

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[1] *See* Brief for the United States as Amicus Curiae in Support of Vacatur and Remand, *BG Group PLC v. Republic of Arg.*,

If the United States views the Vienna Convention as the authoritative guide to treaty interpretation, and the Supreme Court accords great deference to the executive branch's interpretation of treaties, then it follows that an interpretive method that is consistent with the Vienna Convention is proper. The majority opinion is exactly in conformity with the Vienna Convention, whereas the dissenting opinion is not.

Article 31 of the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." VIENNA CONVENTION ON THE LAW OF TREATIES, art. 31(1). "Context" is defined, among other things, as "the text, including its preamble and annexes." *Id.* at art. 31(2). Context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty" and "[a]ny instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *Id.* Supplementary means of interpretation are also permitted for limited purposes. Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances

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134 S.Ct. 1198 (2014) ; Brief for the United States as Amicus Curiae Supporting Petitioner, *Abbott v. Abbott*, 560 U.S. 1 (2010); Brief for the United States as Amicus Curiae Supporting Respondents, *Sanchez-Llamas v. Johnson* (Nos. 05-51, 04-10566), 2006 WL 271823, at *23.

> of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

Id. at art. 32.

The textual focus of the Vienna Convention is clear, allowing for supplementary means of interpretation only after the text of a treaty demonstrates an ambiguity or an absurd result. In others words, the majority properly applies the rules of treaty construction to this appeal, whereas the dissent does not. Moreover, the majority's approach is in conformity with the view of the International Court of Justice as to the proper methodology applied in construing treaties, whereas the dissent's approach is not. *See Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.").

The text of the Convention on the issue of service of process by mail is not ambiguous, and therefore extra-textual materials are irrelevant under Supreme Court cases and international law. The majority opinion in the Texas court of appeals explicitly complied with these authorities and stuck to the unambiguous text of the Convention in its analysis. Accordingly, if

this Court were to accept this case as the vehicle for resolving the split of authority as to whether the Convention authorizes service of process by mail, it would be doing so to affirm what the Texas court of appeals has already held.

CONCLUSION

For the reasons stated herein, Petitioner requests this Court to grant this petition.

Respectfully submitted,

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RECORD AND BRIEFS

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No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY 1

ARGUMENT 1

I. Because the Convention is self-executing, it is irrelevant whether it was implemented in Quebec. 3

II. Even if the Convention were not self-executing, the substance of Quebec law is irrelevant to the federal question presented. 3

III. Respondent waived any arguments regarding Quebec law by concession on appeal. 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

Ackerman v. *Levine*,
788 F.2d 830 (2d Cir. 1986) 4

Kreimerman v. *Casa Veerkamp, S.A. de C.V.*,
22 F.3d 634 (5th Cir. 1994) 5

Lyman Steel Corp. v. *Ferrostaal Metals Corp.*,
747 F. Supp. 389 (N.D. Ohio 1990) 6

Medellin v. *Texas*,
552 U.S. 491 (2008) 3

Menon v. *Water Splash, Inc.*,
472 S.W.3d 28 (Tex. App.—Houston
[14th Dist.] 2015, pet. denied) 6

Midmark Corp. v. *Janak Healthcare Private Ltd.*,
No. 3:14-CV-088, 2014 WL 1764704
(S.D. Ohio May 1, 2014) 6

Moberg v. *33T LLC*,
666 F. Supp. 2d 415 (D. Del. 2009) 5

Riendeau v. *St. Lawrence & Atl. R. Co.*,
167 F.R.D. 26 (D. Vt. 1996) 4

In re S. African Apartheid Litig.,
643 F. Supp. 2d 423 (S.D.N.Y. 2009) 5

Rissew v. *Yamaha Motor Co.*,
129 A.D.2d 94 (N.Y. App. Div. 1987) 3

Trask v. *Serv. Merch. Co.*,
135 F.R.D. 17 (D. Mass. 1991) 3

Vorhees v. *Fischer & Krecke*,
697 F.2d 574 (4th Cir. 1983) 3

TABLE OF AUTHORITIES – continued

Page(s)

Treaties, Statutes, and Rules

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 ..... *passim*

TEX. R. CIV. P. 108a(d) 4

Other Authorities

Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331 (2014) 5-6

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY

Respondent agrees the question presented implicates a split of authority on an important federal question. However, respondent claims review is unwarranted because her position on the question presented is correct and, even if it were not, the judgment below could be affirmed on an alternative basis. Neither argument counsels against review.

Because respondent's position represents the minority viewpoint, the question presented warrants review even if respondent's position were correct. And respondent's alternative ground for affirmance was not addressed—or even acknowledged—by the lower courts. In addition, it does not counsel against review for two further reasons. First, the argument that service was invalid in the trial court because it did not comply with foreign law is unsupported by applicable authority. Second, respondent conceded in the court of appeals that the federal question presented here was determinative of whether service of process was proper in this case.

ARGUMENT

As a threshold matter, it is important to note what respondent does not deny. Respondent does not deny that the question presented implicates an important and recurring federal question on a fundamental issue of civil procedure that has split state and federal courts for over 25 years. Respondent also does not

deny that the court of appeals followed the minority position. Finally, respondent does not deny petitioner's contention that the one potential strike against review (that the decision below arises from a state intermediate court) is of lesser weight given other considerations.

Respondent does argue against review on the basis that her position on the merits is correct. As to that, petitioner's views are not restated here as they have already been presented by the petition, the dissent below, and other lower courts that have also adopted it. In addition, respondent's position on the merits does not counsel against review: if anything, because respondent's position represents the minority viewpoint on a longstanding split of authority, the question presented would, if anything, be more worthy of review if respondent's position were ultimately determined to be correct.

Respondent otherwise claims that the judgment below could be affirmed on an alternative basis. In particular, respondent contends that, even if service by mail were permitted by the Hague Service Convention ("Convention"), such service was nevertheless ineffective here because (1) the Convention has not been implemented in Quebec; (2) the validity under federal law of service by mail to Quebec depends on its validity under Quebec domestic law; and (3) service by mail is invalid under Quebec domestic law. Setting aside point (3)—which neither lower court addressed or even mentioned—points (1) and (2) are both incorrect. Independently, respondent waived all three arguments concerning Quebec law by conceding in the

court of appeals that the single federal question presented here was outcome determinative of the case.

I. Because the Convention is self-executing, it is irrelevant whether it was implemented in Quebec.

Respondent argues that the validity of a treaty within a foreign State or subdivision depends on whether the treaty was implemented by the domestic law of that foreign State or subdivision. But that principle only applies when a treaty is not self-executing. See *Medellin* v. *Texas*, 552 U.S. 491, 504-05 (2008). Respondent cites no authority that the Hague Service Convention is *not* self-executing, however, and numerous courts have found it is, including the Fourth Circuit. See *Vorhees* v. *Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983); see also *Trask* v. *Serv. Merch. Co., Inc.*, 135 F.R.D. 17, 21 (D. Mass. 1991); *Rissew* v. *Yamaha Motor Co.*, 129 A.D.2d 94, 98 (N.Y. App. Div. 1987), and authorities cited therein.

II. Even if the Convention were not self-executing, the substance of Quebec law is irrelevant to the federal question presented.

Respondent cites Supreme Court authority for the proposition that treaties which are not self-executing must be implemented within a forum before they can be invoked in that forum. Opp. at 7. But as also shown by those cases, the relevant forum for that principle is *the forum where the treaty is invoked.* Here, however, that forum is Texas[1]—not Quebec—and so respondent's argument about the substance of Quebec law is

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[1] Respondent does not contend that the Convention is inoperative in Texas, and the conclusion that it is operative

simply misplaced. Consistently, although respondent's opposition cites 29 state and federal cases that postdate the Convention, none invalidated foreign service on the basis that, although service was valid under the Convention,[2] it was invalid under the domestic law of any foreign State or subdivision.

Comity Considerations.—Although respondent does not use the word "comity," this Court might independently question whether that doctrine could come within the scope of the question presented if service were invalid under Quebec domestic law as respondent claims. As a threshold matter, because the federal issue here arises from state law incorporation of United States treaty obligations, see *supra* note 1, any comity considerations here should only arise under principles of state—rather than federal—common law, and respondent waived any comity argument under state common law by not raising that doctrine in

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there follows from both the fact that the Convention is self-executing and the fact that the Convention has been implemented by reference in the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 108a(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made . . . pursuant to the terms and provisions of any applicable treaty or convention[.]").

[2] In one case, a court quashed service because service by mail allegedly did not comply with Quebec law. See *Riendeau* v. *St. Lawrence & Atl. R. Co.*, 167 F.R.D. 26, 29 (D. Vt. 1996). But that court never held that service by mail was proper under the Convention and, in fact, was precluded from so holding since the Second Circuit decided in 1986 that the Convention did not authorize such service. See *Ackerman* v. *Levine*, 788 F.2d 830, 839 (2d Cir. 1986).

either the trial court or court of appeals.[3]

That said, if the Court determined that federal comity principles were both relevant and fairly included in the question presented, petitioner would note that other federal courts have held comity to be inapplicable when a treaty controls.[4] See *Kreimerman* v. *Casa Veerkamp*, S.A. de C.V., 22 F.3d 634, 643–44 (5th Cir. 1994) (holding that the Convention's service methods were a "safe harbor" from attempts to quash service on comity grounds); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 438 (S.D.N.Y. 2009) (refusing to apply comity to prevent plaintiff from serving German defendants via the Convention: "If German courts had reached a final judgment that service via Hague Convention processes would violate German sovereignty or security, comity considerations would be stronger. That has not yet—and may never—come to pass."); see also Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*,

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[3] In addition, petitioner is unaware of any Texas authority suggesting it would be an abuse of discretion for a trial court to refuse to quash service on state law comity grounds where service was valid under a treaty.

[4] Petitioner did locate one case where a court quashed service by mail, in part, on comity grounds. See *Moberg* v. *33T LLC*, 666 F. Supp. 2d 415, 425 (D. Del. 2009). That court's comity rationale was unsupported by any cited authority, however. In addition, the court's invocation of comity—a doctrine concerning domestic recognition of foreign law—cannot be reconciled with its prior determination that service by mail was permissible under both the Convention and applicable foreign law. *Id.* at 424-25.

86 TEMP. L. REV. 331, 358-361 (2014) (arguing that comity is an inadequate basis for applying foreign law to service of process issues).[5]

III. Respondent waived any arguments regarding Quebec law by concession on appeal.

As previously stated (Pet. 16), respondent conceded on appeal that the validity of service in this case depended solely on the answer to the federal question presented. See *Menon* v. *Water Splash, Inc.*, 472 S.W.3d 28, 35 (Tex. App.—Houston [14th Dist.] 2015) (Christopher, J., dissenting) ("[Menon] concedes that '[i]f Article 10(a) [of the Convention] authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good.[']" (quoting Appellant's Brief at 20)).[6]

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[5] Courts have quashed service on comity grounds when service was attempted by means *not* authorized by the Convention or when the foreign State objected to the form of service. See *Midmark Corp. v. Janak Healthcare Private Ltd.*, No. 3:14-CV-088, 2014 WL 1764704, at *3 (S.D. Ohio May 1, 2014) (invoking comity to deny plaintiff's request to effectuate service by email); *Lyman Steel Corp.* v. *Ferrostaal Metals Corp.*, 747 F. Supp. 389, 400-01 (N.D. Ohio 1990) (invoking comity to quash service by mail where foreign State objected to such service).

[6] In preparing this reply, the undersigned noticed that the quoted language from the dissent was inexplicably omitted from that opinion's reproduction in the appendix. To avoid any ambiguity on this point, petitioner has thus directly cited the reported decision below.

Respondent does not deny the accuracy of the dissent's quotation of her appellate brief, nor does respondent make any attempt to explain why the dissent's characterization of that quote as a concession was incorrect. Rather, respondent just claims that petitioner's report of the concession, Pet. at 16, was "not accurate." Opp. 9. Respondent does not explain what was inaccurate, however, and just claims she raised the issue in the lower courts.

But petitioner does not deny that respondent argued the validity of service under Quebec law in the lower courts. At the same time, however, respondent cannot deny that she conceded the irrelevance of that issue if service by mail was proper under the Convention, the single federal question presented here. As such, respondent's arguments concerning Quebec law present no alternative basis for this Court, or the lower one, to affirm the judgment.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 25, 2016
CERTIORARI GRANTED DECEMBER 2, 2016

TABLE OF CONTENTS

Page

Relevant Docket Entries:

District Court of Galveston County, Texas, No. 13-CV-0205, Relevant Docket Entries .. 1

State of Texas in the Fourteenth Court of Appeals, No. 14-14-00012-CV, Relevant Docket Entries 3

Supreme Court of Texas, No. 15-0901, Relevant Docket Entries 4

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [as reprinted in 28 USCA Federal Rules of Civil Procedure following Rule 4] 5

Trial Court:

Motion for Substituted Service on Defendant, Tara Menon (CR149) May 13, 2010..... 18

Order Granting Plaintiff's Motion for Substituted Service (CR166) May 17, 2013. 37

Default Judgment - Non Final (Interlocutory) (CR489) September 25, 2013 39

Order of Dismissal - Final - OCA (SuppCR6) December 31, 2013 46

Order Denying Defendant's Motion for New Trial (CR584) January 3, 2014 48

TABLE OF CONTENTS—Continued

Page

Court of Appeals:

Opinion issued REVERSED AND REMANDED June 30, 2015 49

Opinion issued DISSENTING June 30, 2015. 59

Judgment June 30, 2015..... 94

Motion for en banc reconsideration disposed DENIED October 6, 2015..... 95

Supreme Court of Texas:

Petition for Review disposed Denied May 27, 2016..... 97

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
02/12/13	Original Petition – OCA (CR6)
05/10/13	Motion for Substituted Service on Defendant, Tara Menon (CR149)
05/17/13	Order Granting Plaintiff's Motion for Substituted Service (CR166)
05/21/13	Plaintiff's First Amended Original Petition (CR167)
08/01/13	Motion for Default Judgment Against Tara Menon (CR303)
09/16/13	Plaintiff's First Supplement to Motion for Default Judgment Against Tara Menon (CR331)
09/25/13	Default Judgment - Non Final (Interlocutory) (CR489)
10/21/13	Rule 11 Agreement Regarding Settlement of Case (CR495)

DATE	PROCEEDINGS
10/28/13	Defendant's Motion for New Trial (CR497)
12/16/13	Plaintiff's Response to Defendant Tara Menon's Motion for New Trial (CR558)
12/31/13	Plaintiff's Motion to Dismiss, with Prejudice, as to South Pool and SPA, Inc. and Muhammad Tello, Only (SuppCR4)
12/31/13	Order of Dismissal - Final - OCA (SuppCR6)
01/03/14	Order Denying Defendant's Motion for New Trial (CR584)
01/05/14	Notice of Appeal (CR585)

THE STATE OF TEXAS IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

v.

WATER SPLASH, INC.,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/22/2014	Reporters record filed
3/12/2014	Clerks record filed
4/18/2014	Brief filed - oral argument requested
5/13/2014	Supplemental clerks record filed
6/18/2014	Brief filed - oral argument requested
6/30/2015	Opinion issued REVERSED AND REMANDED
6/30/2015	Opinion issued DISSENTING
7/15/2015	Motion for en banc reconsideration filed
7/17/2015	Response requested by the court
7/24/2015	Response filed
10/6/2015	Motion for en banc reconsideration disposed DENIED
7/14/2016	Mandate issued

SUPREME COURT OF TEXAS

Case No. 15-0901

WATER SPLASH INC.,

v.

MENON,

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/2015	Petition for Review
12/4/2015	Response Waiver filed
1/8/2016	Supreme Court of Texas Requested Response
2/5/2016	Response to Petition
2/22/2016	Reply to Response
5/27/2016	Petition for Review disposed Denied

Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters

[as reprinted in 28 USCA Federal Rules of Civil Procedure following Rule 4]

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular

case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905 [99 BFSP 990], and on 1st March 1954 [286 UNTS 265], this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

[Signatures omitted.]

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed 05/13/2010]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

PLAINTIFF'S MOTION FOR SUBSTITUTE SERVICE OF PROCESS ON DEFENDANT, TARA MENON

Plaintiff, Water Splash, Inc., asks the court to authorize substitute service on Defendant, Tara Menon. In support of this Motion, Plaintiff will show the Court as follows:

I. BACKGROUND

Defendant Tara Menon is a non-resident individual who does business in Texas and who conspired with co-defendant South Pool and Spa, Inc. to commit numerous torts in Texas against plaintiff Water Splash, Inc. However, Menon is a Canadian resident and she is not believed to maintain a regular place of business in Texas. Menon does not maintain an agent for service of process in Texas. Defendant is subject to personal jurisdiction in the State of Texas because she satisfies the requirements stated in the Texas Long Arm Statute. However, attempts to serve her have failed.

Article 10(a) of the Hague Convention states, "[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." Convention done at The Hague art. 10(a), Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, C.T.S. 1989/2. Canada has not objected to use of certified mail as a proper means of service[1]. Thus, the use of postal channels is a proper means of service under Article 10(a) of the Hague Convention.

Service was attempted by mailing citation with a copy of Plaintiff's Original Petition attached thereto through the Texas Secretary of State, located at 1019 Brazos, Room 220, Austin, Texas 78701. The Texas Secretary of State then attempted service by forwarding the citation with the petition attached to Tara Menon at her address at 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2 ("Menon's Address"), by certified mail, return receipt requested. See attached *Exhibit A*.

Menon is a former employee of Plaintiffs and Menon's Address is the same address that Menon provided to Plaintiff for her employment documentation as well as the address for delivery of mail. See *Exhibit B* - Affidavit of Gokhan Celik.

Additionally, on February 13, 2013, after this suit was filed and Ms. Menon found out about the lawsuit, she sent to Mr. Celik an email which acknowledges her awareness of the lawsuit, and also attaches Invoices

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[1] See United States Department of State: http://travel.state.gov/law/judicial/judicial_682.html. ("In its Declaration and Reservations on the Hague Service Convention, Canada did not object to the methods of service under Article 10, and does permit service via postal channels.").

for her services. See *Exhibit C* - Email from Menon to Celik dates February 13, 2013. A review of the Invoices shows that the address she used at that time is the same as the address where service was previously attempted in this matter.

Plaintiff's attempt to formally serve Menon have not been successful and Plaintiff seeks an order from this Court permitting substituted service on Menon by alternative means which are reasonably effective to give Menon notice of the suit.[2]

II. MOTION FOR SUBSTITUTE SERVICE OF PROCESS

Texas Rule of Civil Procedure 109a allows a court to "prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice." Accordingly, Plaintiffs request that the Court authorize service in the following manners:

1) Service by first class mail, certified mail, and Federal Express to Menon's address; and

2) Service by email to each of Menon's known email addresses.

Service by first class mail, certified mail (return receipt requested), and Federal Express to the Address noted herein. Menon is known to regularly check and receive mail at the Address, so her receipt of the citation is likely. Service via email to each of the

---

[2] NOTE: There can be no doubt that Menon has already received a copy of the lawsuit and is aware that she is a defendant in the lawsuit. *Exhibit C* (email from Menon to Celik dated February 13, 2013).

following emails that Menon has been known to use over the past 12 months:

Menon2@securenet.net

tmenon@southpoolandspa.net

tdmenon58@gmail.com

Olivia@southpoolandspa.net

Service via email is permitted when an actual address is not known and the party being served has recently used the address on which service is requested.

Menon used the email address of tmenon@southpool andspa.net as recently as February 13, 2013 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit D* - Document Bates Labeled Def. South Pool 0156.

Menon used the email address of menon2@ securenet.net as recently as January 2, 2013 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit E* - Document Bates Labeled Def. South Pool 0157.

Menon used the email address of tdmenon58@gmail .com as recently as May 15, 2012 when she used it to communicate with co-Defendant, South Pool and Spa's Mike Tello. See attached *Exhibit F* - Document Bates Labeled Def. South Pool 0071.

Plaintiff attaches the affidavit of Plaintiff's attorney, Andrew K. Meade, to this motion as *Exhibit G* to verify the attempts at service, and incorporates it by reference.

III. CONCLUSION

Plaintiff has taken all reasonable steps to locate Menon and to personally serve her. Because these

efforts have failed, the Court should grant this motion. This will give Plaintiff the chance to receive the same injunctive relief as previously ordered in this matter and to allow the case to proceed. Plaintiff further asks for all other relief to which it is justly entitled.

Respectfully submitted,

HAWASH MEADE GASTON NEESE & CICACK LLP

/s/Andrew K. Meade

Andrew K. Meade
Texas Bar No. 24032854
Samuel B. Haren
Texas Bar No. 24059899
2118 Smith Street
Houston, Texas 77002
713.658.9001
713.658 9011 (Fax)
ameade@hmgllp.com
sharen@hmgllp.com

Attorneys for Water Splash, Inc.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been served to the following pursuant to the Texas Rules of Civil Procedure on May 10, 2013.

Via Facsimile: (713) 481-9495 and Email
Ms. Jill Yaziji
Yaziji Law Firm
1001 Texas, Suite 1400
Houston, Texas 77002

/s/Andrew K. Meade
Andrew K. Meade

Exhibit A

[SEAL] The State of Texas
Secretary of State

2013-223954-1

I, the undersigned, as Secretary of State of Texas DO HEREBY CERTIFY that according to the records of this office, a copy of the Citation and Plaintiff's Original Petition, Application For Temporary Restraining Order, Request For Temporary And Permanent Injunction And Request For Disclosures in the cause styled:

Water Splash Inc Vs Tara Menon et al
212th Judicial District Court of
Galveston County, Texas
Cause No: 13CV0205

was received by this office on February 15, 2016, and that a copy was forwarded on February 21, 2013, by REGISTERED MAIL, return receipt requested to:

Tara Menon
916 boul De Sainte-Adele, Bur 113
Saint Adele, QC J8B 2N2
Canada

The PROCESS was returned to this office on April 1, 2013, Bearing the notation Non Reclame

[SEAL]

Date issued: April 2, 2013

/s/ John Steen
John Steen
Secretary of State

Exhibit B

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

AFFIDAVIT OF GOKHAN CELIK

BEFORE ME, the undersigned authority, on this day personally appeared GOKHAN CELIK, who under oath stated as follows:

"My name is Gokhan Celik. I am over eighteen (18) years of age and am legally competent to make this Affidavit, which is true and correct, is based on my personal knowledge, and is made voluntarily and not under duress.

I am the owner of Water Splash, Inc., Plaintiff in the above-styled and numbered lawsuit. The address provided to Water Splash, Inc. by Tara Menon is 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2. Menon is a former sales representative for Water Splash, Inc. and this is the same address that Menon provided to me for her employment documentation as well as the address for delivery of mail. Menon is known to regularly check and receive mail at the Address."

Further, affiant sayeth not.

/s/ Gokhan Celik
Gokhan Celik

SWORN AND SUBSCRIBED TO before me on this 9 day of May, 2013.

/s/ T. Rogers
Notary Public

T. ROGERS
Notary Public State of Texas
My Commission expires
November 14, 2016

Exhibit C

Subject: Re: Tyler
From: Gokhan Celik <gcelik@watersplashnet.com>
Date: Tue, May 15, 2012 8:29 am
To: South Pool <mike@southpoolandspa.net>
Cc: tara menon <tdmenon58@gmail.com>

Hi Mike,

As we spoke yesterday, I mentioned faxing the contract. I will re-fax and scan and email you. I just came to my office.

Talk to you soon,
Gokhan

On Tue, May 15, 2012 at 9:17 am, South Pool <mike @southpoolandspa.net> wrote:

Good morning Gokhan. We need to get the contract signed and faxed today please. Also let me know when to expect the deposit. My hands are tied right now, I don't have a contract, I don't have a deposit and I don't have product to install. However, we do have a deadline of 5/30. The club is having a party of 320 kids on june 1st. Please let me know if I need to pull out. I need to make a decision. Y end of day today.

Thank you for your understanding
Mike

–

Water Splash Inc.
(800) 936-3430
www.watersplashnet.com

Subject: Products on Galveston project
From: Tara <tara@southpoolandspa.com>
Date: Wed, Feb 13, 2013 2:36 pm
To: Mike@southpoolandspa.net

Mike,

I don't know where the production is on these but, [redacted] needs to make some changes to the design somewhere so they don't look like Gokhan's. Of course the loop, in grounds, etc are all very similar but, Horse, Cowboy Hat, he has to make changes enough so that you are not dealing with any patent violations. Though, I don't think Gokhan has patented anything quite frankly.

T

Subject Re: Deposit
From: tare <tara@southpoolandspa.com>
Date: Wed, Jan 02, 2013 10:03 pm
To: Mike@southpoolandspa.net

will create an invoice for both Galveston and for Cape Christian. Was the contract ok for you? I think we will be required to deliver some modifications, particularly related to the substructure bases. [redacted] Metal/plastic?

So you want to order parts for Galveston from [redacted]? is that correct?

I am only returning towards the 24th. Long trip and apologize but it was planned a long time ago....all family I haven't seen in ages but, wow India has got to be the craziest place on the planet. Drives you hotel.

t

On 2013-01-03 12:07 AM, Mike@southpoolandspa.net wrote:

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Subject: Deposit
From: Mike@southpoolandspa.net
Date: Wed, Jan 02, 2013 12:37 pm
To: "taramen1" <menon2@securenet.net>,
"Tara" <Tara@southpoolandspa.com>

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Exhibit D

Subject: Products on Galveston project
From: Tara <tara@southpoolandspa.com>
Date: Wed, Feb 13, 2013 2:36 pm
To: Mike@southpoolandspa.net

Mike,

I don't know where the production is on these but, [redacted] needs to make some changes to the design somewhere so they don't look like Gokhan's. Of course the loop, in grounds, etc are all very similar but, Horse, Cowboy Hat, he has to make changes enough so that you are not dealing with any patent violations. Though, I don't think Gokhan has patented anything quite frankly.

T

Exhibit E

Subject Re: Deposit
From: tara <tara@southpoolandspa.com>
Date: Wed, Jan 02, 2013 10:03 pm
To: Mike@southpoolandspa.net

will create an invoice for both Galveston and for Cape Christian. Was the contract ok for you? I think we will be required to deliver some modifications, particularly related to the substructure bases. [redacted] Metal/plastic?

So you want to order parts for Galveston from [redacted]? is that correct?

I am only returning towards the 24th. Long trip and apologize but it was planned a long time ago....all family I haven't seen in ages but, wow India has got to be the craziest place on the planet Drives you hotel.

t

On 2013-01-03 12:07 AM, Mike@southpoolandspa.net wrote:

Tara:

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Thanks
Mike

Subject: Deposit
From: Mike@southpoolandspa.net
Date: Wed, Jan 02, 2013 12:37 pm
To: "taramen1" <menon2@securenet.net>,
"Tara" <Tara@southpoolandspa.com>

Tara:

Hope all is well. When are you coming back? We need to get deposit from Galveston and Florida. [redacted] is almost ready to provide feature for Galveston project

Thanks
Mike

Exhibit F

Subject: Re: Tyler
From: Gokhan Celik <gcelik@watersplashnet.com>
Date: Tue, May 15, 2012 8:29 am
To: South Pool <mike@southpoolandspa.net>
Cc: tara menon <tdmenon58@gmail.com>

Hi Mike,

As we spoke yesterday, I mentioned faxing the contract. I will re-fax and scan and email you. I just came to my office.

Talk to you soon,
Gokhan

On Tue, May 15, 2012 at 9:17 am, South Pool <mike @southpoolandspa.net> wrote:

Good morning Gokhan. We need to get the contract signed and faxed today please. Also let me know when to expect the deposit. My hands are tied right now, I don't have a contract, I don't have a deposit and I don't have product to install. However, we do have a deadline of 5/30. The club is having a party of 320 kids on june 1st. Please let me know if I need to pull out. I need to make a decision. Y end of day today.

Thank you for your understanding
Mike

--

Water Splash Inc.
(800) 936-3430
www.watersplashnet.com

Exhibit G

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

AFFIDAVIT OF ANDREW K. MEADE

STATE OF TEXAS)
)
COUNTY OF HARRIS)

Before me, the undersigned notary, on this day personally appeared Andrew K. Meade, a person whose identity is known to me. After I administered an oath to him, upon his oath he said:

1. "My name is Andrew K. Meade. I am 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am an attorney licensed to practice in the State of Texas, with over 11 years of experience representing plaintiffs and defendants in commercial litigation and arbitration.

3. Plaintiff, Water Splash, Inc., retained me to represent it in a suit against South Pool and Spa, Inc. and Tara Menon. Ms. Menon is a Canadian resident

who does not maintain a regular place of business in Texas to the best of my knowledge.

4. Service was initially attempted on Ms. Menon by certified mail, return receipt requested. As evidenced by Exhibit H, this mailing came back unclaimed.

5. Subsequently, Plaintiff's Original Petition and Request for Disclosures was forwarded to the Secretary of State of Texas for service pursuant to the Texas Rules of Civil Procedure. The Secretary of State forwarded a copy of the Petition and Request for Disclosures to Ms. Menon on February 21, 2013. As evidenced on the Certificate from the Secretary of State (Exhibit A), process was returned to their office on April 1, 2013, bearing the notation "Non Reclaim".

7. As evidenced by various emails attached to this Motion, Ms. Menon uses various email accounts and it is my opinion that she will receive notice of this suit (if she has not already) by forwarding to her various email addresses.

FURTHER AFFIANT SAYETH NOT.

Signed under the pains and penalties of perjury this 10th day of May, 2013.

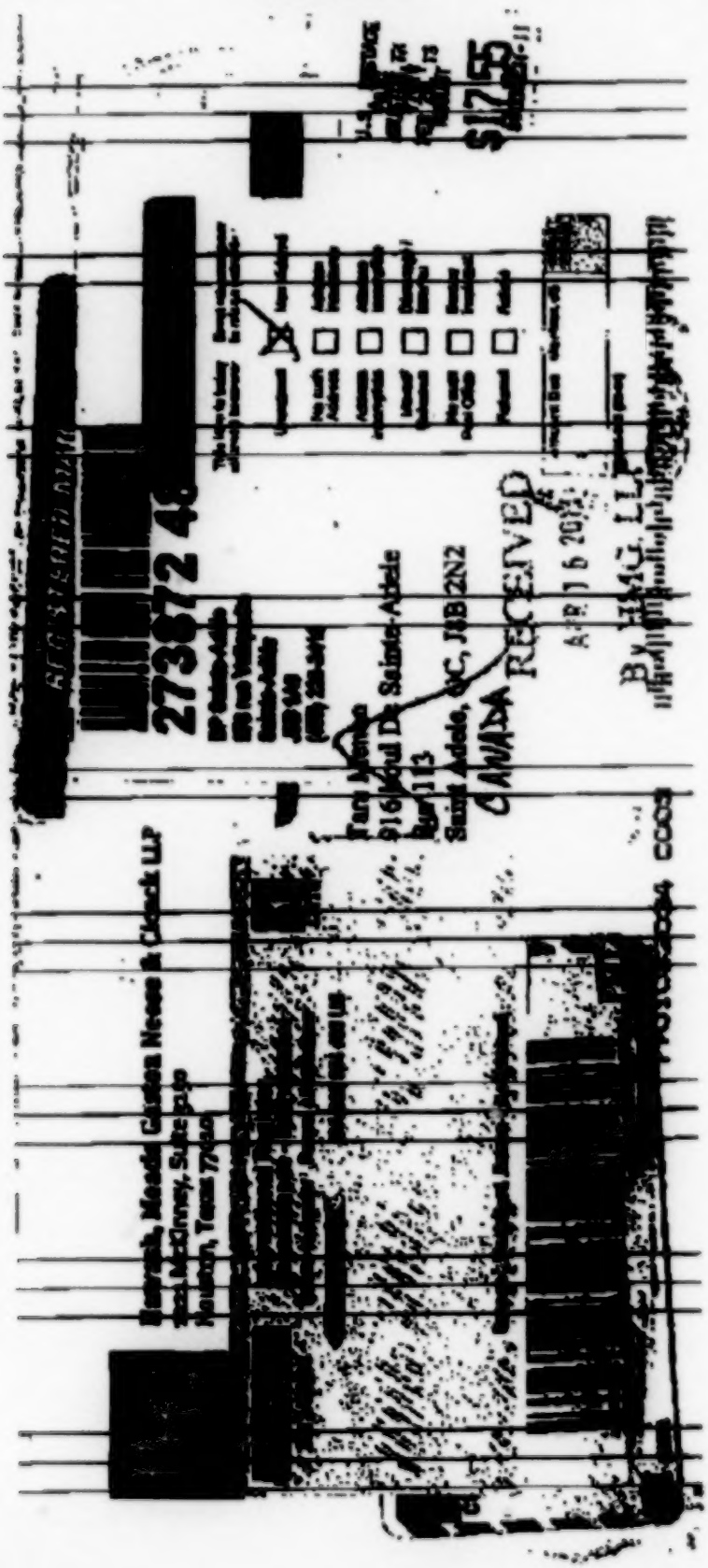
/s/ Andrew K. Meade

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 10th day of May, 2013, to certify which witness my hand and official seal.

/s/ Nancy K. Jacobs
NOTARY PUBLIC, STATE OF TEXAS

NANCY K. JACOBS
Notary Public, State of Texas
My Commission Expires
February 17, 2014

Exhibit H



IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed: May 17, 2013]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUBSTITUTE SERVICE OF PROCESS ON DEFENDANT, TARA MENON

On this day the Court came to consider Plaintiffs' Motion for Substituted Service of Process on Defendant, Tara Menon (the "Motion"). The Court finds that Plaintiff has diligently and reasonably attempted to locate Defendant, Tara Menon's address and to effectuate personal service on her and that further efforts to locate and personally serve Menon would likely be futile.

After considering the facts, law, and argument of counsel, the Court has decided to GRANT the Motion. The Court hereby ORDERS that Plaintiff may serve Menon by publication. The Court further finds that the following methods of service are more likely than publication to provide Menon with actual notice of this suit and accordingly permits Plaintiff to use such methods to achieve service:

1) Service by first class mail, certified mail (return receipt requested), and Federal Express to 916 boul De Sainte-Adele, Bur 113, Saint Adele, QC, J8B 2N2.

2) Service via email to Menon's known email addresses:
Menon2@securenet.net;
tmenon@southpoolandspa.net;
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Olivia@southpoolandspa.net

Signed on this the 17th day of May 2013.

/s/ [Illegible]
Judge Presiding

IN THE DISTRICT COURT OF
GALVENSTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed: September 25, 2013]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

DEFAULT JUDGMENT AND PERMANENT INJUNCTION AGAINST TARA MENON

On this date, the Court considered Plaintiff, Water Splash, Inc.'s Motion for Default Judgment against Tara Menon. Plaintiff appeared and Defendant, Tara Menon, although duly cited to appear failed to file an answer or otherwise make an appearance in this matter within the time allowed by law. The Court has been presented evidence establishing that Menon has availed herself to jurisdiction in the State of Texas by travelling to and conducting business in the State of Texas, and specifically in Galveston County, Texas. The Court also finds that Defendant was given proper notice of this suit, as well as being provided proper notice of Plaintiff's Motion for Default Judgment and of this hearing. The Court finds the evidence supports that Defendant is not in the military or in active duty.

The Court, having reviewed the evidence submitted, makes the following findings of fact which are deemed admitted by Tara Menon due to her failure to appear in this matter:

1. Water Splash, Inc. filed this lawsuit on February 12, 2013. After that date, Tara Menon contacted an attorney for Defendant South Pool and Spa via email to discuss the lawsuit. Menon is aware of this lawsuit and has been provided notice of this suit in accordance with the Laws of the State of Texas.

2. Tara Menon was an employee of Water Splash, Inc. from 2011 to February 2013.

3. In July 2012, Menon submitted two bids to the City of Galveston to construct splash pads at Wright Cuney Park and Menard Park (the "Bids"). Menon submitted these bids as "Sales Manager" of South Pool & Spa, Inc.

4. The Bids submitted by Menon and South Pool and Spa, Inc. included trade names, design, CAD, and warranty information belonging to Water Splash, Inc. Menon did not have permission from Water Splash to submit the Bids using Water Splash design, CAD or warranty documents.

5. At the time of the Bid submissions, Water Splash possessed an exclusive distributor agreement with Adventure Playground. Adventure Playground also submitted bids for the Wright Cuney Park and Menard Park splash pad projects. Adventure Playground's bids both contained trade names, design, CAD and warranty documents from Water Splash, Inc. Adventure Playground did have consent to use Water Splash's design, CAD and warranty documents in their bids.

6. There were two bids submitted for the Wright Cuney Park splash pad project. The contract

to construct the Wright Cuney Park splash pad project was awarded to South Pool and Spa. Adventure Playground's bids was second. But for South Pool and Spa's bid, Adventure Playground would have won the Wright Cuney Park bid.

7. There were three bids submitted for the Menard Park splash pad project. The contract to construct the Menard Park splash pad project was awarded to South Pool and Spa. Adventure Playground's bids was second. Specialty Construction's bid was third. But for South Pool and Spa's bid, Adventure Playground would have won the Menard Park bid.

8. Menon's conduct, as Sales Manager of South Pool and Spa, was wrongful in that she used, without permission, proprietary information belonging to her employer, Water Splash. Menon violated the confidentiality provision of her employment agreement.

9. Had Adventure Playground been awarded the Bids, Water Splash would have generated income based upon the sale of its products and warranty. Water Splash's income from the Menard Park and Wright Cuney Park projects would have been at least $75,000 and as much as $95,000.

10. After Menon's termination from Water Splash, Inc. in February 2013, Menon has continued to use and disseminate Water Splash's proprietary documents. Based on the evidence presented, Menon has sent proprietary Water Splash documents to AquaTronics, located in Instanbul, Turkey, and she has requested that AquaTronics

modify or revise the plans and specifications in such a way to change the character of the product to not appear to look like Water Splash's proprietary products.

Based upon Menon's failure and refusal to appear in this matter, the Court finds that Menon has admitted the foregoing.

1. On the claims of unfair competition, conversion, tortious interference with prospective business, and conspiracy, the court finds in favor of Plaintiff, Water Splash, Inc. and against Defendant, Tara Menon, and awards Plaintiff the amount of $60,000.00 to be paid by Defendant, Tara Menon.

2. The Court further finds that Menon is guilty of fraud, breach of fiduciary duty, and violation of the Texas Theft Liability Act. The Court finds that the conduct of Menon was intentional and was done with malice. Therefore, Plaintiff is awarded $60,000.00 against Menon as exemplary or punitive damages.

3. Plaintiff is entitled to prejudgment interest on the damages awarded herein, measured from February 12, 2013, through the date of entry of this order at the rate of 5% per annum.

4. Plaintiff is entitled to recover its reasonable and necessary attorney's fees for the prosecution of this case. The Court finds that Plaintiff is entitled to recover the amount of $9,500.00 which is reasonable and necessary for this case. It is further ORDERED, ADJUDGED, AND DECREED that in the event this matter is appealed to the court of appeals and Plaintiff prevails at the appellate level, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees. It is further ORDERED, ADJUDGED, AND DECREED that in the event a Writ of Error is

filed with the Texas Supreme Court and Plaintiff prevails at that stage, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees. It is further ORDERED, ADJUDGED, AND DECREED that in the event a Writ of Error is granted by Texas Supreme Court and Plaintiff prevails at that stage, Plaintiff shall be awarded $7,500.00 in reasonable and necessary attorney's fees.

5. Plaintiff is entitled to post-judgment interest on the total amount of the judgment and any prejudgment interest awarded hereinabove, at the rate of 5% per annum from the date this judgment is signed until paid.

6. It is further ORDERED, ADJUDGED, AND DECREED that Judgement here rendered shall include all taxable Court costs expended or incurred by Plaintiff in this cause which are hereby adjudged against Defendant, Tara Menon.

IT IS FURTHER ORDERED that Plaintiff, Water Splash, Inc., is entitled to enforce this judgment through abstract, execution and any other process necessary.

Furthermore, having analyzed the law and considered the evidence and testimony of witnesses, and the argument of counsel, the Court finds that there exist grounds upon which a Permanent Injunction should be issued against Menon.

Based upon Menon's conduct in the past and continued conduct relating to the use and alteration of Water Splash's proprietary information, Defendant, Tara Menon, her current or former agents, servants, employees, subcontractors and any entity owned by Defendant Menon or subject to her control are

PERMANENTLY ENJOINED and PROHIBITED from:

1. Using Water Splash's trade name or logo without its express permission;
2. Using Water Splash's plans, drawings, designs, marketing materials, specifications, renderings, product photos, CAD drawings, and/or any other materials created or owned by Water Splash without its express permission (including the use of such materials with or without redaction of any reference to Water Splash);
3. Intentionally soliciting business of Water Splash customers based upon any customer lists obtained from Water Splash through unauthorized means;
4. Representing that any plans, drawings, designs, marketing materials, specifications, renderings, product photos, CAD drawings, and/or any other materials created by or owned by Water Splash used in conjunction with submitting bids on projects (City of Galveston or otherwise) are those of Menon, if they originated from Water Splash;
5. Use of any products, drawings, scientific materials or technical data belonging to Water Splash or bearing the Water Splash name that have been altered, modified, or changed to appear as if they are not belonging to Water Splash;
6. Use of any design, technical, scientific or other related materials belonging to Water Splash to have third party suppliers build a product based upon a Water Splash design;

7. Conducting any business using products named "Water Jet #1", "Water Hoop", "Bubbler", "Fan Tail", "Wispy Misty", or any modifications to said products. Menon is also prohibited from changing the names of these products to avoid the mandates of this Injunction.

8. Engaging in the business of sales, installation, design or distribution of splash pads in connection with Mike Tello, South Pool and Spa, or any business or entity in which Mike Tello or South Pool and Spa have any direct or indirect ownership or profit interest.

Any and all other relief not expressly granted herein is DENIED.

SIGNED this 17 day of Sept, 2013.

/s/ [Illegible]
Judge Presiding

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212th JUDICIAL DISTRICT

[Filed Jan. 3, 2014]

No. 13-CV-0205

WATER SPLASH, INC.

vs.

TARA MENON and SOUTH POOL and SPA, INC.

ORDER ON PLAINTIFFS' MOTION TO DISMISS, *WITH PREJUDICE,* AS TO SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO, ONLY

BE IT REMEMBERED that on this day came on for consideration the Plaintiff's Motion to Dismiss *With Prejudice* as to SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO, only, filed by WATER SPLASH, INC. ("PLAINTIFF"). The Court after considering same is of the opinion the motion is well-taken and should be GRANTED. It is therefore,

ORDERED, ADJUDGED and DECREED that Plaintiff's *Motion to Dismiss With Prejudice as to South Pool and Spa, Inc. and Muhammad Tello, Only,* is GRANTED and that Plaintiffs claims against SOUTH POOL AND SPA, INC. AND MUHAMMAD TELLO are hereby DISMISSED WITH PREJUDICE, with costs of Court taxed against the party incurring same. It is further,

ORDERED, ADJUDGED and DECREED that the Court's Default Judgment entered against TARA MENON on September 17, 2013 is a Final Judgment.

Any and all other relief not specifically granted herein is DENIED.

SIGNED AND ENTERED ON THIS 3rd DAY OF January, 2014.

/s/ [Illegible]
JUDGE ACTING

IN THE DISTRICT COURT OF
GALVESTON COUNTY, TEXAS
212TH JUDICIAL DISTRICT

[Filed Jan. 3, 2014]

Cause No. 13-CV-0205

WATER SPLASH, INC.

Plaintiff,

VS.

TARA MENON and SOUTH POOL and SPA, INC.

Defendants.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Came on this day to be heard Defendant's Motion for New Trial ("Motion"), and the Court, having considered the Motion, any response thereto, the evidence, the applicable legal authorities and the arguments, of counsel, is of the opinion that the Motion is meritorious and should be DENIED. It is, therefore,

ORDERED that Defendant's Motion for New Trial is DENIED.

SIGNED this 30th day of December 2013.

/s/ [Illegible]
JUDGE ACTING

Reversed and Remanded and Majority and Dissenting Opinions filed June 30, 2015.

[SEAL] THE STATE OF TEXAS
IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

Appellant

v.

WATER SPLASH, INC.,

Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CV-0205

OPINION

Appellant, Tara Menon ("Menon"), appeals the trial court's default judgment granted after she failed to answer the suit filed by appellee, Water Splash, Inc. ("Water Splash"). In four issues, Menon contends that the trial court erred in refusing to set aside the default judgment because state law cannot allow service of process in foreign nations where the service does not comport with the requirements of the Hague Service Convention. We reverse and remand.

I. BACKGROUND

Menon is a citizen of Canada, residing in Quebec. Water Splash is a Delaware corporation with its principal office located in Champlain, New York. Water Splash sued Menon in Galveston, Texas. In its original petition, Water Splash alleged that Menon was its regional sales representative and that Menon also began to act as a sales manager for South Pool, a competitor of Water Splash. Sometime in 2012, Water Splash discovered that South Pool had used some of Water Splash's designs and drawings when submitting a bid to the City of Galveston for the construction of splash pads at two parks. A year later, Water Splash sued South Pool and Menon for unfair competition, conversion, tortious interference with business relations, and conspiracy.

To effectuate service, Water Splash filed a motion for alternative service of process pursuant to Texas Rule of Civil Procedure 108a. *See* Tex. R. Civ. P. 108a. The motion requested that the trial court order service on Menon in Quebec, Canada, by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses." The trial court granted the motion.

After Menon did not file an answer or otherwise appear, Water Splash moved for default judgment alleging it had diligently sought service on Menon utilizing the methods allowed for substituted service. The motion stated that service was accomplished by sending a letter to Menon's Quebec address by certified mail, return receipt requested and first class mail, and Water Splash introduced evidence of those attempts at service. Water Splash also alleged that Menon's emails proved she knew of the existence of the suit. The trial court granted the motion for default

judgment against Menon and awarded actual and exemplary damages and attorneys' fees.

Menon filed a motion for new trial seeking to set aside the default judgment because service was not accomplished pursuant to the terms of article 10(a) of the Hague Service Convention. Water Splash responded, arguing Rule 108a was an acceptable form of alternative service. The trial court denied Menon's motion for new trial.

II. ANALYSIS

In four interrelated issues involving the interpretation of particular words in the Hague Service Convention, appellant attacks the trial court's grant of default judgment and denial of her motion for new trial.

A. Standard of Review

We review a trial court's denial of a motion for new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009). A trial court abuses its discretion if it reaches a decision without reference to any guiding rules or principles, or acts in an arbitrary or unreasonable manner. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Absent waiver, a trial court lacks personal jurisdiction over a defendant to whom citation has not been "issued and served in a manner provided for by law." *See Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). In a direct appeal from a no-answer default judgment, there is no presumption of valid issuance, service, and return of citation. *See id.* (quoting *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884. 836

(Tex. 1985)) (per curiam). Thus, a default judgment cannot withstand a direct attack unless the record affirmatively shows strict compliance with the rules for service of citation. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam). Whether a trial court has personal jurisdiction over a defendant is a question of law, which we review *de novo*. *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476, 479 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

B. Hague Convention

Articles 2 through 7 of the Hague Convention require a signatory nation to establish a "Central Authority" which acts as an agent to handle various matters regarding requests for service, service of documents and proof of service. Article 10(a) of the Hague Convention, at issue here, states:

> Provided the State of designation does not object, the present Convention does not interfere with
>
> (a) the freedom to *send* judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent person of the State of origin to effect *service* of judicial documents directly through the judicial officer, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to effect *service* of judicial document directly through the judicial officers, officials, or other competent persons of the State of destination.

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters, art. 10, No. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, *available at* http:www.hcch.net/index_en.php?act=conventions.text&cid=17 (last visited June 22, 2015) ("Hague Convention"). The question before us turns on the meaning attributed to "send" and "service."

Where it applies, compliance with the provisions of the Hague Convention is "mandatory." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988). Its purpose is to provide a more efficient and effective manner of service of process abroad and to ensure that defendants sued in foreign jurisdictions receive timely notice of suit. *Id.*, at 699; *see also Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002). In *Nuovo*, plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term "send" in connection with the delivery of judicial documents, but used "serve," "service," and "to effect service" in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed "send" and determined that, because "service" was used throughout the Hague Convention while "send" was confined solely to article 10(a), this demonstrated that the drafters did not "intend to give the same meaning to 'send' that they intended to give to 'service.'" *Id.* at 384. In short, the drafters intended to attach meaning to the specific word used. *See id.*

The Hague Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361, art. 1. The Hague

Convention "preempts any inconsistent methods of service prescribed by Texas law in all cases where the Convention applies." *Wuxi Taihu Tractor Co, Ltd. v. York Group, Inc.*, No. 01-13-00016-CV, 2014 WL 6792019, at *5 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem. op.) (citing *Paradigm Entm't, Inc. v. Video Sys. Co.*, No. Civ. A. 3:99-CV2004P, 2000 WL 251731, at *4 (N.D. Tex. Mar. 3, 2000) (concluding service was effective where secretary of state forwarded a copy of service of process to defendant pursuant to Texas law, and Japan did not object to this manner of service).

C. Application of article 10(a)

Menon argues the default judgment should not have been rendered because she was not served with process. *See* Tex. R. Civ. P. 124 ("In no case shall judgment be rendered against any defendant unless upon service . . . ."). Menon further asserts that Water Splash did not effectuate service under Rule 108a, providing for service in a foreign country "pursuant to the terms of any treaty or convention," because she was not served pursuant to the Hague Convention service of process provisions. She argues "the drafters use the words 'serve,' 'service,' and 'to effect service' in other sections, including subparts (b) and (c) of article 10," but they only used the word "send" in subsection (a), which applies only to sending judicial documents. *See Nuovo*, 310 F.3d at 383.

Water Splash argues that article 10(a) allows service of process by mail, and relies on the "majority view" which holds that article 10(a) allows service of process by mail, so long as the state of destination does

not object.[1] Courts following this view include the Second, Fourth, Seventh and Ninth Circuits.[2]

We conclude that the better-reasoned approach is to follow the so-called "minority view" which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.

> 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' through the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'

Nuovo, 310 F.3d at 384 (relying on canons of statutory interpretation and adopting the reasoning of the

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[1] Canada has not objected to the use of the mail for service of process. *See* Canada—Central Authority & Practical Information, HAGUE CONF. OF PRIVATE INT'L. L., http://www.hcch.net/index_en.php?act=authorities.details&aid=248 (last updated Aug. 19, 2014) (listing the text of Canada's declarations, including those to "[t]ransmission through postal channels," and stating that "Canada does not object to service by postal channels" as permitted in article 10(a)); *see also Dierig v. Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968, at *19 (E.D. Ky. Feb. 28, 2012) (mem. op.).

[2] *Ackermann v. Levine*, 788 F.2d 830, 838-39 (2nd Cir. 1986); *Koehler v. Dodwell*, 152 F.2d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); and *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004).

courts which concluded that article 10(a) of the Hague does not permit service of process by mail); *see also Bankson v. Toyota Motor Corp.*, 880 F.2d 172, 174 (8th Cir. 1989) (stating that language used should be regarded as conclusive and concluding that article 10(a) prohibits service of process by registered mail); *see also Wuxi Taihu Tractor*, 2014 WL 6792019, at *6 (citing *Nuovo*, 310 F.23d at 384). *Wuxi* involved service on a defendant located in China attempted under Rule 108a. *Id.* The *Wuxi* court held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention. *Id.*

Because the purpose of the Hague Convention is to "ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation," we are not persuaded that the drafters did not intend what they wrote, particularly where the Hague Convention describes other methods of service. *See Nuovo*, 310 F.3d at 385. Specifically, articles 2 through 7 provide for service of process through a central authority and, under articles 8 and 9, through diplomatic channels. "It is unlikely that the drafters would have put in place these methods of service . . . while simultaneously permitting the uncertainties of service by mail." *Id.*

Further, other federal district courts in Texas which considered whether service of process by mail, under article 10(a) as involved here, or under article 5 which allows service through a central authority, have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention. *See Duarte v. Michelin N. Am., Inc.*, No. 2:13-CV-00050, 2013 WL 2289942, at *4–6

(S.D. Tex. 2013) (considering question of service by mail on the secretary of state and determining, following *Nuovo*, that service by mail not authorized under the Hague Convention) (citing *Berezowsky v. Ojeda*, No. 4:12-CV-03496, 2013 WL 150714, at *7 (S.D. Tex. 2013) (holding service was not effectuated under articles 2-5 which allows service of process under the Hague Convention through Mexico's Central Authority, demonstrating court's adherence to the specific meaning of the words used in the Hague Convention); *L.K. v. Mazda Motor Corp.*, No. 3:09-cv-469-M, 2009 WL 1033334, at *2 (N.D. Tex. 2009) (holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met); *Albo v. Suzuki Motor Corp.*, No. 3:08-0139-KC, 2008 WL 2783508, at *2 (W.D. Tex. 2008) (holding service not effective because, under article 5, the Hague Convention required full translation of documents into Japanese and without complying with specific Hague Convention requirements, service was insufficient).

Further, in addition to *Wuxi*, two other state courts have considered whether the specific words used in the Hague Convention have specific meanings regarding service of process or sending of judicial documents. *See In re J.P.L.*, 359 S.W.3d 695, 706 (Tex. App.—San Antonio, 2011, pet. denied) (holding that service of process in a child custody matter must be accomplished through the provisions of the Hague Convention and service on the Central Authority in Mexico); *Velasco v. Ayala*, 312 S.W. 3d 783, 794 (Tex. App.—Houston [1st Dist. 2009, no pet.) (relying on article 10(a) and *Nuovo* and concluding that service of process must be accomplished pursuant to the requirements of the Hague Convention).

In sum, we conclude the specific provisions set forth in the Hague Convention govern service, whether through article 5 and its reliance on a central authority, or on the language expressed in article 10(a).

For these reasons, we sustain appellant's four issues, reverse the trial court's default judgment and permanent injunction against Tara Menon, and remand for further proceedings consistent with this opinion.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Donovan, and Wise (Christopher, J., dissenting).

Reversed and Remanded and Majority and Dissenting Opinions filed June 30, 2015.

[SEAL] THE STATE OF TEXAS
IN THE
FOURTEENTH COURT OF APPEALS

No. 14-14-00012-CV

TARA MENON,

Appellant

v.

WATER SPLASH, INC.,

Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 13-CV-0205

DISSENTING OPINION

The only question that appellant Tara Menon presents for our review is whether service by mail to a defendant in Canada is permitted under Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Service Convention").[1] The majority concludes that it is not.[2] In reaching this

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[1] *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

[2] *But see Cook v. Toidze*, 950 F. Supp. 2d 386, 394 (D. Conn. 2013) ("[S]ervice by regular mail is proper under the Hague Convention where the party served is a resident of Canada.");

result, the majority fails to follow the United States Supreme Court's directions on the construction of treaties and the Texas Supreme Court's instructions on the correct approach to decisions of the federal courts. Because Texas intermediate appellate courts are bound by these authorities, I instead would follow their precepts, which lead to the conclusion that service by mail to a litigant in Canada is permitted under Article 10(a) of the Service Convention. I accordingly would affirm.

I. ISSUES PRESENTED

It is unnecessary to detail the facts in this case, because although Menon's brief lists four issues, she has presented only a single narrow question of law. That question is presented in her third issue, in which she asks, "Did the drafters of the Hague Service Convention intend for the word 'send' contained in Article 10(a) to mean 'serve'?" She restates the question in her fourth issue, asking, "May a litigant serve a Canadian citizen and resident of Québec with

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Mitchell v. Theriault, 516 F. Supp. 2d 450, 455 (M.D. Pa. 2007) (holding that service of process by mail on a resident of Québec is not prohibited by the Service Convention); *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000) ("[S]ervice by registered mail in Quebec is adequate service under the Convention."); *Randolph v. Hendry*, 50 F. Supp. 2d 572, 578 (S.D. W. Va. 1999) ("Because Canada does not object to service by postal channels, service of process by mail is authorized in this case."); *Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997) ("Plaintiffs' use of registered mail, return receipt requested, to transmit the summons and complaint [to defendants in Québec] was in compliance with the Hague Convention."); *Cantara v. Peeler*, 701 N.Y.S.2d 556, 557 (App. Div. 1999) (holding that Article 10(a) permits service by mail upon residents of Canada because Canada has not objected to service through postal channels).

process in a Texas civil proceeding (bypassing traditional diplomatic channels and the Central Authority under the Hague Service Convention) by sending citation directly to the Canadian citizen . . . by mail, private delivery service, or e-mail?"

Menon's first two issues do not raise any other questions. Her briefing of her first stated issue ("Did the trial court err in denying the motion for new trial and refusing to set aside the default judgment?") contains no argument, but instead consists solely of an introduction and a single statement, with citations, regarding the standard of review.[3] In her second issue, she asks, "Can state law provide a procedure for service of process in foreign nations that does not comport with traditional international law (e.g. letters rogatory) or the Hague Service Convention?" As stated, this issue begs the question of whether service by mail comports with the Service Convention.

Menon has not briefed any other grounds for reversing the trial court's denial of her motion for new trial or setting aside the default judgment. Moreover, she concedes that "[i]f Article 10(a) authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good." *See* TEX. R. CIV. P. 108a(1)(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made . . . pursuant to the terms and provisions of any

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[3] *See* Tex. R. APP. P. 38.1(i); *Archer v. DDK Holdings LLC*, No. 14-14-00017-CV, 2015 WL 1393299, at *4 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (where appellants stated an issue challenging the judgment and the trial court's findings on two grounds, but only briefed one ground, they waived appellate review of the unbriefed ground).

applicable treaty or convention . . . ."). But, before reaching this question, it is first necessary to clarify the standard of review.

II. STANDARD OF REVIEW

We review the trial court's ruling on a motion for new trial for abuse of discretion, but "abuse of discretion" means different things in different contexts. *See Schuring v. Fosters Mill Vill. Cmty. Ass'n*, 396 S.W.3d 73, 76 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Here, the relevant facts are undisputed, and Menon moved for a new trial on the ground that Article 10(a) of the Service Convention does not permit service by mail. We accordingly are presented only with a question of law, not with a matter within the trial court's discretion. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts."). Courts review questions of law de novo. *Pinnacle Premier Props., Inc. v. Breton*, 447 S.W.3d 558, 563 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (sub. op.).

III. GOVERNING LAW

In this country, there are at least two competing lines of authority interpreting Article 10(a) of the Service Convention. The prevailing view holds that Article 10(a) permits service by mail. *See, e.g., Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004); *Research Sys. Corp. v. IPSOS Publicité*, 276 F.3d 914 (7th Cir. 2002); *Koehler v. Dodwell*, 152 F.3d 304 (4th Cir. 1998); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986). The countervailing view holds that Article 10(a) does not permit service by mail. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172

(8th Cir. 1989). This provision had not been construed previously by the United States Supreme Court, the Texas Supreme Court, or this court. In the absence of binding precedent for us to follow, this case presented our court with the opportunity to choose the better-reasoned approach. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (explaining that Texas courts "are *obligated* to follow only higher Texas courts and the United States Supreme Court").

Fortunately, however, our existing tools are equal to the task of breaking new ground. Although there is no binding precedent that answers the specific question before us, there is binding precedent that tells us how to find that answer for ourselves. I accordingly would look first to the United States Supreme Court to identify the principles that both state and federal courts are required to apply in construing treaties. Next, I would follow the same steps used by our nation's highest court in applying those principles. *See Life Partners, Inc. v. Arnold*, Nos. 14-0122 & 14-0226, 2015 WL 2148767, at *7 (Tex. May 8, 2015) ("We have described the Supreme Court's decisions in some detail here, however, because in addition to providing the relevant test, they also describe the proper *approach* to the term's construction.").

A. Principles of Treaty Construction

In construing Article 10(a) of the Service Convention, this court is bound by the following principles.

1. A treaty is not legislation. *See Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-33, (2014) ("A treaty is in its nature a contract between . . . nations, not a legislative act.'" (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829))); *id.* at 1233 ("[I]n their nature

treaties originate differently from laws. They are made by equal parties, and each side has half of the bargain to make . . . ." (quoting 2 Debates on the Federal Constitution 506 (J. Elliot 2d ed. 1863) (James Wilson))).

2. A treaty is not construed in the same way as legislation. *See id.* at 1233 ("That distinction [between a legislative act and a contract] has been reflected in the way we interpret treaties."); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929) ("The narrow and restricted interpretation of the treaty . . . , while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties.").

3. A treaty instead is construed in the manner of a contract. *See Lozano*, 134 S. Ct. at 1232-33; *see also BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Santovincenzo v. Egan*, 284 U.S. 30, 40 & n.2 (1931) ("[T]reaties are contracts between independent nations . . . .").

4. A treaty, however, is construed more liberally than a private contract. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943) ("[T]reaties are construed more liberally than private agreements . ."); *see also Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936) ("[T]reaties should be liberally construed so as to give effect to the apparent intention of the parties."); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933) (explaining that "[c]onsiderations which should govern the diplomatic relations

between nations, and the good faith of treaties" require that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred"); *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 454 (1930) (explaining that it is a "fundamental principle that treaties should receive a liberal interpretation to give effect to their apparent purpose").

5. Such a liberal construction is required to secure equality and reciprocity between the signatories. *See Factor*, 290 U.S. at 293 (explaining that treaties are "liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them"); *Jordan v. K Tashiro*, 278 U.S. 123, 127 (1928) (same); *see also Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 80 (Tex. 2000) ("As treaties are to be construed broadly, the treaty need not provide explicitly for equal court access; it need only imply it." (citing *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924)).

B. Steps in Applying the Principles of Treaty Construction

As the foregoing principles show, we are required to construe a treaty more liberally than a private contract to implement the apparent intention of the parties to secure equality and reciprocity between them. And although the construction of a treaty begins with its text, we are not permitted to end the inquiry there. *See, e.g., Abbott v. Abbott*, 560 U.S. 1, 9-10 (2010) ("This Court's inquiry is shaped by the text of the Convention; the views of the United States Department of State; decisions addressing the meaning of 'rights of custody' in courts of other contracting states; and the purposes of the Convention."); *Choctaw*

Nation, 318 U.S. at 431-32 ("[T]o ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (citing *Factor*, 290 U.S. at 294, 295)).

As a practical matter, then, how do we apply the principles that govern treaty construction? To answer this question, I would again look to the precepts set forth by the United States Supreme Court. *See Life Partners, Inc.*, 2015 WL 2148767, at *7.

1. Identify the Treaty's Purpose.

The text must be read "with a view to making effective the purposes of the high contracting parties." *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *see also El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (identifying a treaty's "cardinal purpose"). The treaty's purpose may be expressly stated in its preamble, *see Tseng*, 525 U.S. at 169, and the role played by a specific provision may be gleaned from the treaty's structure and the context in which the provision appears. *See Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (noting that the Court considers the treaty's "text, structure, and history"); *Tseng*, 525 U.S. at 169 (identifying the treaty interpretation that "is most faithful to the Convention's text, purpose, and overall structure"); *Santovincenzo*, 284 U.S. at 37 (considering "the context of the provision in question").

2. Identify the signatories' shared expectations.

The treaty must be read "in a manner 'consistent with the shared expectations of the contracting parties.'" *Lozano*, 134 S. Ct. at 1233 (quoting *Husain*, 540 U.S. at 650); *Tseng*, 525 U.S. at 167 (same); *Air France v. Saks*, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific words of the treaty a meaning

consistent with the shared expectations of the contracting parties."); *see also Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 223-25 (1996) (rejecting the petitioners' interpretation of a phrase as "implausible" and "unlikely" in view of "the shared expectations of the contracting parties," and instead concluding that "an equally plausible reading . . . that leads to a more comprehensible result" was the only "realistic" alternative). Adherence to the parties' shared expectations is required because—unlike legislation—a treaty is "necessarily the product of consensus." Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1923 (2005). "Contrary to the majoritarian premise of statutory adoption, there is no means of imposing treaty obligations on a dissenting minority. If the product of negotiations is not satisfactory, a disaffected nation may simply not ratify the treaty." *Id.*

It therefore is no surprise that to identify those shared expectations, courts must consider the treaty's negotiating and drafting history. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 507 (2008); *Tseng*, 525 U.S. at 167; *Zicherman*, 516 U.S. at 226; *Choctaw Nation*, 318 U.S. at 431-32; *Factor*, 290 U.S. at 294-95; *Nielsen*, 279 U.S. at 52. The construction of the Service Convention is no exception to this rule. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) (examining the Service Convention's drafting history and negotiations).

To understand a treaty's negotiating and drafting history, its provisions must be considered in the language used by the drafters in the official text. *See Zicherman*, 516 U.S. at 221 (considering the meaning of the French word *dommage* where the official text of

the treaty was in French, and rejecting the contention "that we simply look to English dictionary definitions of 'damage' and apply that term's 'plain meaning'"); *Saks*, 470 U.S. at 399 ("We look to the French legal meaning for guidance as to [the signatories' shared] expectations because the Warsaw Convention was drafted in French by continental jurists."); *Todok*, 281 U.S. at 454 ("The text of the treaty of 1783 with Sweden was in French only, and the French text is therefore controlling."). Where the official text of the treaty was drawn up in two languages, then courts consider both languages when analyzing the parties' shared expectations. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (where a treaty was drawn up in both Spanish and English, the Court considered the text in both languages, explaining that "[n]o violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other").

The Service Convention was drafted "in the English and French languages, both texts being equally authentic." *Schlunk*, 486 U.S. at 699; *see also* Service Convention, *supra* note 1, at closing paragraph (stating that the Service Convention was drafted "in the English and French languages, both texts being equally authentic, in a single copy"). Thus, the negotiating and drafting history of the Service Convention's text in both languages must be considered. *See Schlunk*, 486 U.S. at 700-01 (considering French terms that were proposed for inclusion in the Service Convention and comparing the meanings given to the terms "in some countries, such as France" and "in others, such as the United States"). This negotiating and drafting history may be documented by the conference's rapporteur. *See United States v. Louisiana*, 394 U.S. 11, 43 (1969).

In addition to considering the text itself, courts consider the way in which the text was interpreted by the delegates involved in negotiating and drafting the treaty. *See Schlunk*, 486 U.S. at 703 (considering statements and articles by Philip Amram, the head of the United States delegation to the Convention); *id.* at 709-10 & n.1, 714, 716 (Brennan, J., concurring) (same). The delegates' views also may be memorialized by the conference rapporteur. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 530 n.13 (1987).

3. Accord "great weight" to the Executive Branch's interpretation.

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 560 U.S. at 15 (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982)); *Medellín*, 552 U.S. at 513 (same); *Tseng*, 525 U.S. at 168 ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty.").

4. Accord "considerable weight" to the interpretation of the other signatories.

Finally, the parties' shared expectations are shown by their post-ratification understanding and conduct. *See Medellín*, 552 U.S. at 507; *Husain*, 540 U.S. at 649-50; *Tseng*, 525 U.S. at 167; *Zicherman*, 516 U.S. at 227; *see also O'Connor v. United States*, 479 U.S. 27, 33 (1986) ("The course of conduct of parties to an international agreement, like the course of conduct of parties to any contract, is evidence of its meaning."). These may be documented in an organizational handbook or report. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 n.40 (1993) (quoting Office of United Nations

High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 46 (Geneva, Sept. 1979)). The United States Supreme Court instructs us that, when interpreting a treaty, "'[t]he opinions of our sister signatories . . . are entitled to considerable weight.'" *Abbott*, 560 U.S. at 16 *(Tseng*, 525 U.S. at 176); *Saks*, 470 U.S. at 404 (same).

5. Consider the analysis of scholars.

See Abbott, 560 U.S. at 18 ("Scholars agree that there is an emerging international consensus on the matter.").

IV. APPLICATION

Having identified the governing precepts in the construction of treaties and the way in which they are applied, I would pursue the same approach in this case.

A. The Service Convention's Purpose

The Service Convention's two purposes are stated in its preamble:

> The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organisation of mutual judicial assistance *for that purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions

Service Convention, *supra* note 1, at preamble (emphasis added); *see also Schlunk*, 486 U.S. at 702-04 (looking to the Service Convention's preamble for the identification of its purpose). Consistent with those purposes, the Service Convention's scope is set forth in Article 1: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." Service Convention, *supra* note 1, at Art. 1 (emphasis added).

This is a more specific purpose than that found by the majority in this case. By agreeing with Menon's argument that "she was not served pursuant to the Hague Convention service of process provisions,"[4] the majority necessarily has concluded that there are *non-service* provisions in the Service Convention. But the United States Supreme Court has examined the English and French text of the Service Convention and its drafting history and concluded that the opposite is true: the Court explained that Article 1 "eliminate[d] the possibility" that the Service Convention could apply to transmissions abroad "that do not culminate in service":

> The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extra-judicial document in a civil or commercial matter to a person staying abroad. [3 1964 Conférence de la Haye de Droit International Privé, Actes et Documents de la Dixième Session (Notification) 65 (1965) (3 Actes et Documents)] ("La présente Convention est

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[4] *Ante*, at ___.

> applicable dans tous les cas où il y a lieu *de transmettre ou de notifier* un acte judiciaire ou extrajudiciaire en matière civile ou commerciale à une personne se trouvant à l'étranger") (emphasis added). To be more precise, the delegates decided to add a form of the juridical term "signification" (service), which has a narrower meaning than "notification" in some countries, such as France, and the identical meaning in others, such as the United States. *Id.*, at 152-153, 155, 159, 366. The delegates also criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. *Id.*, at 165-167. The final text of Article 1, *supra*, eliminates this possibility and applies only to documents transmitted for service abroad. The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended. *Id.*, at 366.

Schlunk, 486 U.S. at 700-01 (emphasis added).

In accordance with the United States Supreme Court's analysis, I would conclude that the Service Convention addresses only the transmission of documents that culminate in service, and thus, the reference in Article 10(a) to "send[ing] judicial documents" means "serv[ing] judicial documents." Service Convention, *supra* note 1, at Art. 10(a).

B. The Shared Expectations of the Signatories to the Service Convention

To ascertain the parties' shared expectations, I would consider the actual and proposed language of Service Convention's bilingual text, its negotiating and drafting history, and the understanding of the delegates.

1. Negotiating and Drafting History of the Text

In addition to the text and the negotiating and drafting history previously described, I would give considerable weight to the fact that "[t]he French text of the 1965 convention was copied from three earlier Hague Conference conventions, all of which were understood to allow service upon defendants abroad by mail." *See* Michael 0. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010).

I additionally would consider the following history:

> The Rapporteur's report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail."[5]

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[5] Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177, 186 n.67 (1992) (translated from 3 Actes et Documents de la

If Article 10(a) was considered to include service by telegram, and not to be "limited to registered mail," then it cannot be said, as the majority now holds, that this provision does not permit service by mail.

2. The Understanding of the Delegates

I next would consider the statements of Philip W. Amram, a member of the United States delegation to the Hague Conference that drafted the Service Convention. Indeed, in his concurring opinion in *Schlunk*, Justice Brennan identified Amram as "[t]he head of the delegation" and its "chief negotiator." *Schlunk*, 48 U.S. at 710, 714 (Brennan, J., concurring). Amram also was the only English-speaking member of the Service Convention's drafting committee. *See* Eshleman & Wolaver, *supra*, at 325 (citing Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7-28, 1964, 52 Dep't State Bull. 265, 265-66 (1965)). Amram "told the Senate Foreign Relations Committee that 'unless the requested State objects, direct service by mail' was allowed under Article 10 and 'use of the central authority is not obligatory.'" *Id.* at 325-26 (footnotes omitted).

Because the United States Supreme Court cited Amram's statement to the Senate in the Court's only opinion construing the Service Convention, *see Schlunk*, 486 U.S. at 703, I would consider this statement in ascertaining the signatories' shared expectations. *See also* Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965) ("Article 10 permits direct

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Dixième Session (Conference de la Haye de Droit International Privé) 90 (1964)).

service by mail . . . unless [the receiving] state objects to such service.").

C. The Executive Branch's Interpretation of Article 10(a)

The Executive Branch has unwaveringly maintained that Article 10(a) permits service by mail. "Dean Rusk, the American secretary of state at the time the convention was negotiated, signed, and ratified, stated in his official report to President Johnson: 'Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service.'" Eshleman & Wolaver, *supra*, at 325. The State Department subsequently produced a circular stating that unless a nation "'has made a specific reservation . . . objecting to service by registered mail . . . [service] may be made by international registered mail.'" *Id.* (citing U.S. Dep't of State, Bureau of Consular Affairs, Overseas Citizen Services, Office of Citizen Consular Services, Service of Legal Documents Abroad, *excerpted in* Judicial Assistance: Service: International Registered Mail, [2] 1981-1988 Digest § 6, at 1441-45). And, when the first federal appellate court held to the contrary, "the State Department formally said the . . . ruling was wrong . . . [in suggesting] that the Hague Convention does not permit as a method of service the sending of a copy of the summons and complaint by registered mail to a defendant in a foreign country.'" *Id.* at 326 (citing Letter from Alan J. Kreczco, Legal Adviser, U.S. Dep't of State, to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1991), *excerpted in United States Department of State Opinion Regarding the*

Bankston *Case and Service by Mail to Japan Under Hague Service Convention*, 30 I.L.M. 260, 261 (1991)).[6]

Regarding the specific application of Article 10(a) in this case, the State Department's website shows its view that Canada accepts "service of process by mail."[7]

In accordance with the instructions from the United States Supreme Court, I would give such views "great weight."

D. The Interpretation of Article 10(a) by Other Signatories

The post-ratification understanding of the parties can be seen in a Hague Conference report on the signatories' response to the following question:

> Question D: Have there been any court decisions in your country interpreting Article 10(a) of the Hague Service Convention which reads as follows:
>
> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents by postal channels directly to persons abroad . . ."
>
> [Answer] It was pointed out that the postal channel for service constitutes a method

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[6] Kreczco's name actually is spelled "Kreczko"; his title was Deputy Legal Adviser; and the referenced letter was dated Mar. 14, 1990.

[7] U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Country Information: Canada*, TRAVEL.STATE.GOV, http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/canada.html (last visited June 26, 2015) (parentheses added).

> which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a) in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America in opinions cited in the "Checklist" had concluded that service of process abroad by mail was not permitted under the Convention.[8]

The significance of this unanimity in the interpretation of a convention that has now existed for fifty years and has been signed or ratified by sixty-eight countries cannot be overstated, because as our highest court has explained, the judiciary's "role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty . . . agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Avagliano*, 457 U.S. at 184-85.

Despite a diligent search, I have found no authority that our fellow signatories have interpreted Article 10(a) to pertain only to the "sending" of documents and not to the "service" of documents. Because the required

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[8] PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 4-5 (Apr. 1989), *available at* http://www.hcch.net/upload/scrpt89e_20.pdf (italics omitted).

"extraordinarily strong contrary evidence" is lacking, I accordingly would defer to the signatories' interpretation that Article 10(a) permits service by mail. *See Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984) ("We may not ignore the actual, reasonably harmonious practice adopted by the United States and other signatories in the first 40 years of the Convention's existence." (referring to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in Note following 49 U.S.C. § 1502)); *see also In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189-90 (Tex. 2009) (orig. proceeding) (rejecting the Fifth Circuit's interpretation on a question of law "[g]iven the overwhelming weight of authority" reaching a contrary result).

E. The Interpretation of Article 10(a) by Leading Scholars

I also would follow the example of the United States Supreme Court in consulting the writings of Bruno Ristau as to the intentions of the Service Convention's drafters. *See Schlunk*, 486 U.S. at 698, 700, 703 (citing 1 B. Ristau, International Judicial Assistance (Civil and Commercial) (1984 and 1 Supp. 1986)). Like all of our sister signatories and our own government, Ristau states that Article 10(a) permits service by mail:

> Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." Others concur. "It is clear that . . . every participant in the debates concerning Article 10(a) . . . understood the provision as referring to . . . the use of postal channels for the purpose of service." Another analysis said

> "[p]erhaps the most compelling evidence in support of the theory that Article 10(a) authorizes service by mail is the fact that those who actually participated in the original Convention . . . believe that to be the case."
>
> Ristau quoted the official report on the draft convention, which indicated the language of Article 10 was worded broadly. It is so broad, he writes, that it "permits service by telegram if the State where service is to be made does not object."

Eshleman & Wolaver, *supra*, at 331-32 (footnotes omitted).

Based on all of the foregoing, I would conclude that Article 10(a) of the Service Convention permits service by mail.

V. THE COUNTERVAILING VIEW

The majority concludes that "the better-reasoned approach" is to follow the countervailing view espoused by the Fifth Circuit in *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374 (5th Cir. 2002). The majority, however, has not explained why an approach that eschews the principles of treaty construction laid down by the United States Supreme Court is "better-reasoned," or even how those following the prevailing view have arrived at a different result.

The majority's opinion constitutes binding precedent on this court until it is overruled by a higher court or by our own court, whether in response to a motion for rehearing or for rehearing en banc or in a different case. And because it is binding, I believe it is important for the analysis to be transparent. This is especially so in this case, given that the majority

adopts an interpretation contrary to that of the American delegation, the American government, most American courts, and those of our sister signatories—including, as the majority admits, Canada.[9] I accordingly have applied the governing precepts to illustrate how they necessarily lead to the conclusion that Article 10(a) of the Service Convention permits service by mail. Respectfully, I believe that the majority's differing analysis, like the analyses in the cases on which it relies, is flawed.

A. The Majority's Adoption of the Reasoning of *Nuovo Pignone*

As previously explained, the first precept of treaty construction is that a treaty is not construed as legislation, but instead is construed more liberally than a private contract, drawing on a wide variety of sources in order to implement the signatories' shared expectations. In *Nuovo Pignone*, however, the Fifth Circuit did the opposite. As the court stated it,

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[9] *Ante*, at ___, n.1; *see also* Hague Conference on Private Int'l Law, List of Central Authorities Designated by Canada, HCCH, 6, http://www.hcch.net/upload/authl4ca2014en.pdf (list up-to-date as of August 2014) (identifying the Ministère de la Justice as the Central Authority for Québec and identifying that office's website). On that website, Québec's Central Authority states, "The Convention also sets out other methods of transmitting documents that do not require processing through a Central Authority [including] postal service . . . . Under the Convention, a State may object to those methods although Canada did not declare any opposition when it ratified the Convention." Gouvernement du Québec, *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Other Methods of Transmission*, JUSTICE QUÉBEC, http//www.justice.gouv.qc.ca/english/programmes/sneaje/transmission-a.htm (last updated Feb. 26, 2004).

> We adopt the reasoning of courts that have decided that the Hague Convention does not permit service by mail. In doing so, we rely on the canons of statutory interpretation rather than the fickle *presumption* that the drafters' use of the word "send" was a mere oversight. "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not *presume* that the drafters intended to give the same meaning to "send" that they intended to give to "service."

Id. at 384 (emphasis added). Thus, the Fifth Circuit essentially compared two words—in English only—and treated the distinction between the two as conclusive. *But see* Eshleman & Wolaver, *supra*, at 333-34 (discussing use of the same language in the Conventions of 1954, 1905, and 1896, all of which used the French word translated as "send" in referring to service of process by mail).

This approach follows none of the governing precepts of treaty construction. The majority in this case, like the authors of the cases on which the majority relies, instead have followed a canon of statutory interpretation, despite the United States Supreme Court's contrary directive in a case decided just last year. *See Lozano*, 134 S. Ct. at 1232-33 ("The Hague Convention . . . is a treaty, not a federal

statute. . . . 'A treaty is in its nature a contract between . . . nations, not a legislative act.' . . . That distinction has been reflected in the way we interpret treaties. It is our 'responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties.") (citations and internal quotations omitted, emphasis in original). The majority in this case neither treats the United States Supreme Court's discussion of how a Hague Convention is to be construed as binding precedent, nor explains its reasons for failing to do so. The majority instead follows *Nuovo Pignone*, in which the Fifth Circuit approached the question of treaty construction as though the only alternative to the application of "canons of statutory construction" was a "fickle presumption that the drafters' use of the word "send" was a mere oversight." *Nuovo Pignone*, 310 F.3d at 384. But, the drafters' intent is well-established without the need for a presumption. As previously explained, there is no dispute among the signatories that Article 10(a) permits service by mail. Like the majority in this case, the *Nuovo Pignone* court did not even mention most of the precepts that govern treaty construction, or the fact that the Service Convention's predecessors dating back more than a hundred years used the word "send" even when referring to service of process by mail.

As reasons for rejecting the interpretation of Article 10(a) that is followed by all of the other Service Convention's signatories, the United States government, and a majority of courts in this country, the Fifth Circuit stated as follows:

> Nuovo Pignone's contention that the broad purpose of the Hague Convention is furthered if article 10(a) is interpreted to allow service

by mail is problematic. As noted, the purpose of the Hague Convention is not only to simplify the service of process, but to ensure that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation. Indeed, FED. R. CIV. P. 4(f)(1) presumes that the Hague Convention provides methods of service "reasonably calculated to give notice."

We are not confident, nor should the drafters have been confident in 1967 [sic],[10] that mail service in the more than forty signatories [sic][11] is sufficient to ensure this goal. [In an accompanying footnote, the court added, "Indeed, the advisory committee notes to the 1963 amendments to FED. R. CIV. P. 4 recognize that '[s]ervice of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service.'"] Under Nuovo Pignone's interpretation of article 10(a), the fact that a signatory could object to service by mail is unconvincing. There is no reason to think that signatories with inadequate mail

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[10] The Convention was not drafted in 1967; it was drafted in 1964. *See Schlunk*, 486 U.S. at 698 ("The Hague Service Convention is a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law.").

[11] There were twenty-three member States when the Service Convention was drafted. *See Schlunk*, 486 U.S. at 698 ("Representatives of all 23 countries that were members of the Conference approved the Convention without reservation."); Kurt H. Nadelmann & Willis L. M. Reese, *The Tenth Session of the Hague Conference on Private International Law*, 13 AM. J. COMP. L. 612, 612 n.1 (1964) (listing the twenty-three member States when the Service Convention was drafted).

> services would voluntarily opt out of article 10(a).
>
> Finally, we note that other provisions of the Hague Convention describe more reliable methods of effecting service. Service of process through a central authority under articles 2 through 7 and service through diplomatic channels under articles 8 and 9 require that service be effected through official government channels. It is unlikely that the drafters would have put in place these methods of service requiring the direct participation of government officials, while simultaneously permitting the uncertainties of service by mail.

Id. at 384-85 & n.17. For several reasons, the stated rationale cannot withstand scrutiny.

First, the Fifth Circuit implies that in the Federal Rules of Civil Procedure in effect when the Service Convention was drafted, the advisory committee anticipated that service abroad *by mail* involved difficulties not present in domestic service. To the contrary, however, the advisory committee's only example of difficulties in service abroad was that "a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein."[12] The 1963 amendment to Federal Rule of Civil Procedure 4(i) was intended

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[12] *See* ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 11 (July 18, 1962), *available at* http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-july-1962.

to ameliorate such difficulties by providing for five "alternative provisions for service in a foreign country"—including service by mail. *See Amendments to Rules of Civil Procedure for the U.S. Dist. Courts*, 31 F.R.D. 587, 595 (1963). That provision, "permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country."[13] The Fifth Circuit cites neither evidence nor authority for its contrary assumption.

Second, the court's statement that "[t]here is no reason to think that signatories with inadequate mail services would voluntarily opt out of article 10(a)" is contrary to the statutory textual analysis that the authoring court purports to apply. Specifically, Article 21 of the Service Convention *requires* that "[e]ach Contracting State shall similarly inform the Ministry, where appropriate, of . . . opposition to the use of methods of transmission pursuant to Articles 8 and 10." Service Convention, *supra* note 1, at Art. 21; *see also United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991) ("Where possible, statutes must be read in harmony with one another so as to give meaning to each provision." (citing *Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 261 (1975))). Not only must we presume that signatories that voluntarily chose to sign the agreement intended to comply with Article 21, but such compliance is objectively verifiable by the signatories' post-ratification conduct:

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[13] ADVISORY COMM. ON CIVIL RULES, *supra* note 12, at 12.

approximately half of the Service Convention's signatories have either qualified their acceptance of Article 10 or have opposed it entirely.[14]

Third, the Fifth Circuit makes the unsupported assumption that the drafters would not have permitted service by mail when two "more reliable" methods of service (through a Central Authority and through diplomatic channels) were available. In doing so, the court assumes not only that mail is less reliable, but also that the drafters would not have included both a more reliable and a less reliable method. If this were true, however, then the drafters would have included only the single most reliable method of service, whether that was service through a Central Authority or service through diplomatic channels, but not both. *But see* Philip W. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87, 90 (1965) ("Use of the Central Authority is purely optional with the applicant for service."). And if mail is presumed unreliable, then how are the service documents to be transmitted to a foreign Central Authority *without* the use of mail? *See* Service Convention, *supra* note 1, at Art. 2 ("Each Contracting State shall designate a Central Authority which will undertake to *receive requests for service coming from other Contracting States . . . .)* (emphasis added); *id.* at Art. 3 ("The authority or judicial officer competent under the law of the State in which the documents originate *shall forward to the Central Authority* of the State addressed a request conforming to the model annexed to the present Convention . . . .")

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[14] *See* Hague Conference on Private Int'l Law, *Table Reflecting Applicability of Articles 8(2), 10(a), (b), and (c), 15(2) and 16(3) of the Hague Service Convention*, HCCH (Feb. 2013), http://www.hcch.net/upload/applicability14e.pdf.

(emphasis added). And how, without using mail, is the foreign Central Authority to communicate directly with the applicant as required? *See id.* at Art. 4 ("If the Central Authority considers that the request does not comply with the provisions of the present Convention *it shall promptly inform the applicant* and specify its objections to the request.") (emphasis added); *id.* at Art. 6 ("The Central Authority of the State addressed . . . shall complete a certificate . . . [stating] that the document has been served . . . [or stating] the reasons which have prevented service. The certificate *shall be forwarded directly to the applicant.*") (emphasis added).

Because the Fifth Circuit in *Nuovo Pignone* did not apply the correct precepts of treaty construction but instead relied on unsupported assumptions, I would decline to follow it. The majority states that "other federal district courts in Texas . . . have ruled consistently that service must be effectuated by the specific methods authorized by the terms included in the Hague Convention."[15] But, *all* courts agree that if the Hague Service Convention applies, then service must be effectuated by a means permitted under the treaty's terms. As phrased, this statement begs the question of whether service by mail is permitted under Article 10(a). If the majority intended to suggest that federal district courts in the Fifth Circuit have consistently stated that Article 10(a) does not permit service by mail, then that implication is wrong. *See, e.g., Chattem Chems., Inc. v. Akzo Nobel Chems. B. V.*, 229 F. Supp. 2d 555, 556 (M.D. La. 2002) ("The Court, having reviewed conflicting authorities, finds that service

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[15] *Ante*, at ___.

made pursuant to Article 10(a) comports with the purpose, meaning and intent of the Hague Convention."); *Brown v. Bandai Am., Inc.*, No. 3-01-CV-0442-R, 2002 WL 1285265, at *4 (N.D. Tex. June 4, 2002) ("[T]he Court determines that service of process by mail is permissible under Article 10(a) of the Hague Convention."); *Lafarge Corp. v. M/V MACEDONIA HELLAS*, No. Civ.A. 99-2648, 2000 WL 687708, at *11 (E.D. La. May 24, 2000) ("[T]his court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Friede & Goldman, Ltd. v. Gotaverken Arendal Consultants*, No. CIV A 99-1970, 2000 WL 288375, at *3 (E.D. La. Mar. 16, 2000) ("[T]his Court adopts the reasoning of those courts that conclude that the Hague Convention permits service of process by mail pursuant to Article 10(a)."); *Paradigm Entm't, Inc. v. Video Sys. Co.*, No. Civ.A. 3:99-CV-2004P, 2000 WL 251731, at *7 (N.D. Tex. Mar. 3, 2000) ("[T]his Court finds that Article 10(a) provides for service by mail in the current situation."); *Ortega Dominguez v. Pyrgia Shipping Corp.*, No. Civ.A. 98-529, 1998 WL 204798, at *2 (E.D. La. Apr. 24, 1998) ("[T]his Court finds that Article 10(a) of the Hague Convention permits service of process by mail."); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 851 (W.D. Tex. 1988) ("Plaintiffs' service of process directly upon Dainichi–Japan by registered mail was sufficient to comport with Art. 10(a) of the Hague Convention."); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, Civ. A. Nos. 84-0105 & 84-5442, 1987 WL 4766, at *3 (E.D. La. Apr. 8, 1987) ("Mailing a summons and a copy of the complaint with a return receipt . . . creates personal jurisdiction . . . against a FSIA corporation [i.e, a corporation whose ownership

is vested in a foreign state] . . . in a Hague Service Convention state . . . .").

The majority cites several opinions that were issued by federal district courts in Texas after the Fifth Circuit Court of Appeals decided *Nuovo Pignone*, but these decisions add nothing to the discussion. The authoring courts had no choice but to follow *Nuovo Pignone*, because the opinion constitutes binding precedent over the lower courts in the Fifth Circuit. The distinction between a court that is merely following precedent and one that makes an independent determination of an issue can hardly be overemphasized: the Fifth Circuit's trial courts are *required* to treat the Fifth Circuit Court of Appeals' decisions as binding precedent, whereas Texas state courts—including this one—are *forbidden* to treat them as binding precedent. As the Texas Supreme Court has explained:

> The court of appeals' discussion of [a Fifth Circuit case] and its cursory dismissal of contrary federal precedent from other jurisdictions suggests that the court felt bound by the pronouncements of the Fifth Circuit on federal law issues. This is not the case. . . . By focusing so exclusively on [the Fifth Circuit case], the court of appeals overlooks the . . . the weight of . . . federal court decisions from other jurisdictions.

Penrod Drilling Corp., 868 S.W.2d at 296. The majority's failure to discuss the governing precepts of treaty construction or to address the reasoning of courts that have reached a conclusion contrary to that of the Fifth

Circuit suggests that the majority has fallen into the same error here.[16]

B. The Majority's Reliance on State Court Decisions

The majority's treatment of state court decisions appears to me to be similarly flawed. For example, the majority cites *Wuxi Taihu Tractor Co. v. York Group*,

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[16] This is not the only problem with the majority's discussion of federal district court decisions. The only case that it cites for the proposition that the Service Convention does not permit service by mail is *Duarte v. Michelin North America, Inc.*, No. 2:13—CV—00050, 2013 WL 2289942 (S.D. Tex. May 23, 2013). The majority cites the remaining cases only in connection with articles of the Service Convention that are not at issue here. And although *Duarte* does indeed cite *Berezowsky v. Ojeda*, No. 4:12-CV-03496, 2013 WL 150714 (S.D. Tex. Jan. 14, 2013) that opinion has since been vacated. 765 F.3d 456 (5th Cir. 2014).

The majority cites *L.K. v. Mazda Motor Corp.*, No. 3:09-cv-469-M, 2009 WL 1033334, at *2 (N.D. Tex. Apr. 15, 2009) with the parenthetical, "holding service under article 5 was not effective because Japanese requirement that service be transmitted to the Central Authority was not met." That is not the case's holding. To the contrary, the authoring court did not analyze the adequacy of service at all, but said only that "Plaintiffs' counsel admits that he failed to comply with the requirements of the Hague Convention,"

Finally, the majority cites *Albo v. Suzuki Motor Corp.*, No. 3:08-0139-KC, 2008 WL 2783508 (W.D. Tex. July 2, 2008) with the parenthetical, "holding service not effective because, under article 5, the Hague [Service Convention] required full translation of documents into Japanese and without complying with specific Hague [Service Convention] requirements, service was insufficient." But as the authoring court explains, the Service Convention itself has no such requirement; it simply provides that "'the Central Authority *may* require [the] document be written in, or translated into, the official language or one of the official languages of the State.'" *Id.* at *2 n.2 (quoting Service Convention, *supra* note 1, at Art. 5) (emphasis added).

Inc., stating that the authoring court "held that article 5 of the Hague Convention does not permit service by direct mail to a defendant in China who should have been served through the Central Authority pursuant to the specific language of the Hague Convention."[17] If that were the court's holding, then the case would be merely inapposite, because only Article 10(a) is at issue in this case. But that was not the court's holding, as can be seen from the fact that the *Wuxi Taihu* court *affirmed* the post-answer default against the foreign defendant. No. 01-13-00016-CV, 2014 WL 6792019, at *1 (Tex. App.—Houston [1st Dist.] Dec. 2, 2014, pet. pending) (mem. op.). In describing this as the court's holding, the majority fails to follow the standard for distinguishing between dicta and an alternative holding. *See State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 554 (Tex. 2004) (op. on reh'g) (granting petitioner's motion for rehearing because "we failed to apply the standard for distinguishing between alternative holdings and dicta"); *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001) (explaining that a court's statement is not dicta but instead is an alternative holding if "the court could have relied on either determination to reach its ultimate conclusion"). Moreover, the construction of Article 10(a)—the only issue presented for our review—is never mentioned in *Wuxi Taihu*. Indeed, the issue could not have arisen on the facts in that case, because the defective-service complaint in *Wuxi Taihu* concerned service in the People's Republic of China,[18] which—in accordance with Article 21 of the Service Convention—has formally declared its opposition to "the service of documents in the territory

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[17] *Ante*, at ___.

[18] *See Wuxi Taihu*, 2014 WL 6792019, at *1.

of the People's Republic of China by the methods provided by Article 10 of the Convention."[19] But what the *Wuxi Taihu* court actually held was that, regardless of the appellant's claims of defective service, the appellant nevertheless "chose to answer, and it cannot now, after voluntarily appearing, avoid the consequences of its choice." *See Wuxi Taihu*, 2014 WL 6792019, at *10 n.6 (citing *Onda Enters., Inc. v. Pierce*, 750 S.W.2d 812, 813 (Tex. App.—Tyler 1988, orig. proceeding) (per curiam)). As a result, the entirety of the *Wuxi Taihu* court's discussion of the Service Convention is dicta.

The other Texas cases cited by the majority and decided by our sister courts also do not concern Article 10(a). *See In re J.P.L.*, 359 S.W.3d 695 (Tex. App.—San Antonio 2011, orig. proceeding [mand. denied]); *Velasco v. Ayala*, 312 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2009, no pet.).[20] As in *Wuxi Taihu*, the issue in *Velasco* and in *J.P.L.* concerned service of process in a country that has made a formal declaration of opposition to Article 10. Specifically, both *Velasco* and *J.P.L.* concerned service in Mexico.[21] Like the *Wuxi Taihu* opinion, the *Velasco* opinion cites Article 5 as authority for the proposition that service by mail does

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[19] A courtesy translation of that country's declarations are available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn (last visited June 26, 2015).

[20] *See ante*, at ___.

[21] A courtesy translation of Mexico's "declarations made at the moment of accession" is available on the website of the Hague Conference on Private International Law at http://www.hcch.net/index_en.php?act=status.comment&csid=412&disp=resdn (last visited June 26, 2015).

not comply with the Service Convention. *See Velasco*, 312 S.W.3d at 794. In *J.P.L.*, the authoring court interpreted Article 19 of the Service Convention. *See J.P.L.*, 359 S.W.3d at 707. Thus, in none of the Texas state decisions cited by the majority was the question of the correct interpretation of Article 10 even before the court. These cases accordingly add nothing to the majority's analysis—which make its failure to address the reasoning of the cases that actually do address that question and follow the prevailing view and all the more puzzling.

VI. CONCLUSION

For the reasons stated herein, I would conclude that Article 10(a) of the Service Convention permits service by mail in Canada. Because the majority does not, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Donovan, and Wise (Donovan, J., majority).

[SEAL] THE STATE OF TEXAS
THE FOURTEENTH COURT OF APPEALS

[Filed: June 30, 2015]

No. 14-14-00012-CV

TARA MENON,

Appellant,

v.

WATER SPLASH, INC.,

Appellee.

JUDGMENT

This cause, an appeal from the judgment in favor of appellee, Water Splash, Inc., signed September 17, 2013, was heard on the transcript of the record. We have inspected the record and find error in the judgment. We therefore order the judgment of the court below REVERSED and REMAND the cause for proceedings in accordance with the court's opinion.

We further order that all costs incurred by reason of this appeal be paid by appellee, Water Splash, Inc.

We further order this decision certified below for observance.

[SEAL] FOURTEENTH COURT OF APPEALS
301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 06, 2015

RE: Case No. 14-14-00012-CV

Style: Tara Menon v. Water Splash, Inc.

Please be advised that on this date the court DENIED APPELLEE'S motion for rehearing en banc in the above cause.

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RE: Case No. 15-0901 DATE: 5/27/2016

COA #: 14-14-00012-CV TC#: 13-CV-0205

STYLE: WATER SPLASH INC. v. MENON

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

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AND
BRIEF

No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the
Fourteenth Court of Appeals, Houston, Texas

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QUESTION PRESENTED

In 1965, the member states of the Hague Conference on Private International Law, including the United States, adopted a treaty known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). Article 10(a) of the Hague Service Convention states:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad[.]"

The question presented is:

Does the Hague Service Convention authorize service of process by mail?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

TREATY PROVISION INVOLVED 1

STATEMENT 2

A. The Hague Service Convention 2

B. Statement of Facts 7

C. Lower Court Proceedings 8

1. District Court Proceedings 10

2. Appellate Court Proceedings 13

SUMMARY OF ARGUMENT 17

ARGUMENT 18

I. The scope of the Convention and the text of Article 10(a) confirm that its use of "send" means or includes the concept of service 18

A. "Send" means "serve" because the Convention's scope was limited to regulating service 19

1. The stated purpose of the Convention indicates an intent to limit its scope to service transmittals. 19

2. The negotiating and drafting history of the Convention confirms this conclusion 20

3. Contrary decisions ignore the limited scope of the Convention. 23

B. The text of Article 10(a) confirms that "send" does not exclude the concept of service. 24

II. The signatories shared the expectation that Article 10(a) permitted service by mail. 26

A. Treaties that led up to the Convention allowed service by mail. 26

B. The members of the Conference intended the Convention to permit service by mail. 30

1. The Rapporteur's Report 31

2. The U.S. Delegation's Report 32

3. The Executive Branch's View 32

C. The signatories' post-ratification viewpoints are consistent with their prior expectations. 33

1. The Executive Branch's View 34

2. The Views of Other Signatories 34

D. Other scholarship supports the view that Article 10(a) permits service by mail. 38

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. *Abbott*,
560 U.S. 1 (2010) 32, 34, 36, 38

Ackermann v. *Levine*,
788 F.2d 830 (2d Cir.1986)..... 6

Almendarez-Torres v. *United States*,
523 U.S. 224 (1998) 19

Arco Elec. Control Ltd. v. *Core Intern.*,
794 F. Supp. 1144 (S.D. Fla. 1992)..... 7

Bankston v. *Toyota Motor Corp.*,
889 F.2d 172 (8th Cir. 1989) ... xii, 7, 15, 27, 33-34

BG Group, PLC v. *Republic of Argentina*,
134 S. Ct. 1198 (2014) 18

Borschow Hospital & Medical Supplies, Inc.
v. *Burdick–Siemens Corp.*,
143 F.R.D. 472 (D.P.R. 1992)..... 6

Brockmeyer v. *May*,
383 F.3d 798 (9th Cir. 2004)..... 6, 32, 34, 38

Capitol Brick, Inc. v. *Fleming Mfg. Co., Inc.*,
722 S.W.2d 399 (Tex. 1986)..... 9

Cent. Hanover B. & T. Co. v. *C.I.R.*,
159 F.2d 167 (2d Cir. 1947)..... 24

Choctaw Nation of Indians v. *United States*,
318 U.S. 423 (1943) 26

Consumer Prod. Safety Comm'n v.
GTE Sylvania, Inc.,
447 U.S. 102 (1980) 15

TABLE OF AUTHORITES – CONTINUED

Page(s)

Corley v. United States,
556 U.S. 303 (2009) 22

Dierig v. *Lees Leisure Indus., Ltd.*,
CIV.A. 11-125-DLB, 2012 WL 669968
(E.D. Ky. Feb. 28, 2012) (mem. op.) 6

El Al Israel Airlines, Ltd. v.
Tsui Yuan Tseng,
525 U.S. 155 (1999) 19, 34

Foster v. *Neilson*,
2 Pet. 253, 314 (1829) 18

Frankenmuth Mut. Ins. Co. v. *ACO, Inc.*,
484 N.W.2d 718 (Mich. App. 1992) 7

Girafa.com, Inc. v. *Smartdevil Inc.*,
728 F.Supp.2d 537 (D. Del. 2010) 6

Graphic Styles/ Styles Intern. LLC v.
Men's Wear Creations,
99 F. Supp. 3d 519 (E.D. Pa. 2015) 23

Hammond v. *Honda Motor Co., Ltd.*,
128 F.R.D. 638 (D.S.C. 1989) 22

Hayes v. *Evergo Tel. Co., Ltd.*,
397 S.E.2d 325 (N.C. App. 1990) 7

Honda Motor Co. v. *Superior Court*,
10 Cal. App. 4th 1043 (Cal. Ct. App. 1992) 7

Koehler v. *Dodwell*,
152 F.3d 304 (4th Cir. 1998) 6

Lozano v. *Montoya Alvarez*,
134 S. Ct. 1224 (2014) 18, 26

Medellín v. *Texas*,
552 U.S. 491 (2008) 20, 33

TABLE OF AUTHORITES – CONTINUED

Page(s)

Meek v. *Nova Steel Processing, Inc.*,
706 N.E.2d 374 (Ohio App. 1997) 7

New York State Thruway Auth. v. *Fenech*,
94 A.D.3d 17 (N.Y. App. Div. 2012) 7, 22

Nicholson v. *Yamaha Motor Co., Ltd.*,
566 A.2d 135 (Md. App. 1989) 6

Nuovo Pignone SpA v.
STORMAN ASIA M/V,
310 F.3d 374 (5th Cir. 2002) 7, 14-17

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540 U.S. 644 (2004) 26

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141 F.R.D. 45 (E.D. Pa. 1991) 7

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276 F.3d 914 (7th Cir. 2002) 6

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464 U.S. 16 (1983) 24

Sale v. *Haitian Ctrs. Council, Inc.*,
509 U.S. 155 (1993) 34

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527 A.2d 564 (Pa. Super. 1987) 7

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11 U.S. (7 Cranch) 116 (1812) 25

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33 Cal. App. 3d 808 (Cal.
Ct. App. 1973) 7, 22, 25

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v. *U.S. Dist. Court for S. Dist. of Iowa*,
482 U.S. 522 (1987) 2, 3, 19, 31

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TEX. CIV. PRAC. & REM. CODE § 17.045 ..... 9, 23

TEX. R. CIV. P. 106 ..... 9, 22, 23

TEX. R. CIV. P. 108 9

TEX. R. CIV. P. 109 9

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Page(s)

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U.S. CONST., Art. VI..... 9, 13

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OPINIONS BELOW

The opinion of the court of appeals is reported at 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). J.A. 49-93. The district court's default judgment against respondent is unpublished. J.A. 39-45.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. J.A. 49-93. A timely motion for rehearing en banc was denied on October 6, 2015. J.A. 95. A timely petition for review to the Supreme Court of Texas was denied on May 27, 2016. J.A. 97. The petition for certiorari was filed on August 25, 2016. This Court granted certiorari on December 2, 2016, and has jurisdiction under 28 U.S.C. § 1257(a).

TREATY PROVISION INVOLVED

Article 10 of the English version of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1969), states:

> "Provided the State of destination does not object, the present Convention shall not interfere with –
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

The full text of the Hague Service Convention is reproduced at pages 5-17 of the Joint Appendix.

STATEMENT

A. The Hague Service Convention

The Hague Conference on Private International Law ("Hague Conference" or "Conference") is an association of sovereign States whose members have met periodically since 1893. See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 529 (1987). The United States attended sessions as an observer in 1957 and 1960 before joining the Conference as a member in 1964. *Ibid.*

At the Tenth Session in 1965, representatives of twenty-three member States, including the United States, approved the Convention on the Service Abroad of Judicial and Extrajudicial[1] Documents in

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[1] "Extrajudicial documents" are those which " 'emanat[e] from authorities and judicial officers' of a state. Hague Service Convention, Art. 17 [J.A. 12]. According to the head of the American delegation to the Convention, "[t]he legislative history of the convention indicates that, in European practice, [the term 'extrajudicial document'] is intended to include the official documents of a European notary. In [American] practice, and also in England and Norway, it is intended to include the official documents of administrative agencies and commissions." Philip W. Amram, Statement to Senate Committee on Foreign Relations, *quoted in Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S. EXEC. REP. NO. 90-6, at 14 (1967). Such documents "differ from judicial documents in that they are not directly related to a trial, and [differ] from strictly private documents in that they require the

Civil or Commercial Matters ("Hague Service Convention" or "Convention"). 20 U.S.T. 361 [J.A. 5-17]; *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 698 (1988).

In 1967, the Senate of the United States advised ratification of the Convention, the President then ratified it, and the United States deposited its ratification with the Ministry of Foreign Affairs of the Netherlands. See 20 U.S.T. 361; *Société Nationale*, 482 U.S., at 530. The treaty entered into force on February 10, 1969. 20 U.S.T 361; Convention, Art. 27 [J.A. 13] (providing that the "Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification."). Presently, seventy-one States have ratified or acceded to the Hague Service Convention.[2]

With respect to the Convention, the term "service" necessarily embraces the concept of "service of process": *i.e.*, the formal transmittal of documents that is "legally sufficient to charge the defendant with notice

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involvement of [public officials and] . . . include . . . demands for payment, notices to quit in connection with leaseholds or contracts of employment, protests with respect to bills of exchange and promissory notes . . . [.] Objections to marriage, consents for adoption, and acceptances of paternity are also in this class." Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ¶ 67 (3d ed. 2006) ("PRACTICAL HANDBOOK (2006)").

[2] See Hague Conference on Private International Law, Hague Service Convention Status Table, *available at* https://www.hcch.net/en/instruments/conventions/status-table.

of a pending action." *Schlunk*, 486 U.S., at 700.[3]

The Convention, a revision of prior treaties from 1954 and 1905 concerning civil procedure, had three related purposes:

> "The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad."

Id., at 698.

The Convention requires each State to establish a "Central Authority" to receive service requests from other countries. Convention, Art. 2 [J.A. 5-6]. The Central Authority may impose requirements, such as requiring the service documents to be translated into an official language of the State. Convention, Art. 5 [J.A. 6-7]. After a Central Authority receives a proper request, it must serve the documents by a method authorized by its State's internal law or by any means designated by the requester that are compatible with that law. *Ibid.* The Central Authority must then provide a certificate of service in conformity with a specified model. Convention, Art. 6 [J.A. 7]; see also *Schlunk*, 486 U.S., at 698-99.[4]

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[3] Although "service of process" is a clear example of "service" of "judicial documents," the Hague Service Convention does not use the term "process" or phrase "service of process." J.A. 5-17.

[4] Give the existence of central authorities, one might question the desire to effectuate service through other methods, such as postal channels. In practice, however, the use of the central authority mechanism has been reported to be, at times, costly, lengthy, and/or unreliable. See Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the*

Service through a Central Authority is not the only mode of service provided by the Convention, however. Article 8 allows the use of diplomatic or consular agents to serve a foreign defendant. J.A. 8.[5] Article 9 allows diplomatic agents to forward documents to designated authorities in a receiving State who, in turn, effectuate service on the foreign defendant. *Ibid.* And Article 11 allows two States to agree to methods of service not otherwise specified in the Convention. J.A. 9.

At issue in this case is Article 10, which states that:

> "Provided the State of destination does not object, the present Convention shall not interfere with:
>
> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect ***service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect ***service*** of judicial

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Hague Service Convention, 86 TEMP. L. REV. 331, 344-47 (2014).

[5] Article 8 specifically provides that "[e]ach contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents." J.A. 8. However, "[a]ny State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate." *Ibid.*

> documents directly through the judicial officers, officials or other competent persons of the State of destination."

J.A. 8-9 (emphasis added). Canada—the foreign State of destination here—acceded to the Convention in 1989 and, pursuant to Article 21, filed an official declaration with the Government of the Netherlands, which stated that "Canada does not object to service by postal channels" under Article 10(a). 1529 U.N.T.S. 499 (1989).

As can be seen above, Article 10(a) uses the word "send," while provisions (b) and (c) use the word "service." In addition, the word "send" does not appear anywhere else in the Convention. By contrast, "service" (or "served") appears in the title, preamble, and Articles 1-3, 5-6, 8-16, and 19 of the Convention. J.A. 5-12.

In the United States, this difference in terminology gave rise to a split of authority on the question presented: "Does the Hague Service Conventions authorize service of process by mail?" The Second, Fourth, Seventh, and Ninth Circuits; some district courts in the First, Third, Sixth and Eleventh Circuits; and appellate courts in at least five States have determined that it does, reasoning that "send" either means or includes "serve."[6] Conversely, the Fifth and

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[6] See *Ackermann* v. *Levine*, 788 F.2d 830, 838-39 (2d Cir.1986); *Koehler* v. *Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Research Sys. Corp.* v. *IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); *Brockmeyer* v. *May*, 383 F.3d 798, 802 (9th Cir. 2004); *Dierig* v. *Lees Leisure Indus., Ltd.*, CIV.A. 11-125-DLB, 2012 WL 669968 (E.D. Ky. Feb. 28, 2012) (mem. op.); *TracFone Wireless, Inc.* v. *Does*, No. 11-cv-21871-MGC, 2011 WL 4711458, *3 (S. D. Fla. Oct. 4, 2011) (mem. op.); *Girafa.com, Inc.* v. *Smartdevil Inc.*, 728 F.Supp.2d 537, 543 (D. Del. 2010); *Borschow Hospital & Medical Supplies, Inc.* v. *Burdick-Siemens Corp.*, 143 F.R.D. 472 (D.P.R.

Eighth Circuits; some earlier district court decisions in the Third and Eleventh Circuits; and appellate courts in at least four States, including the court below (J.A. 55-56), have reached the contrary conclusion, reasoning that "send" excludes "serve."[7]

B. Statement of Facts

Petitioner Water Splash, Inc. makes aquatic playground systems known as "splash pads." C.R. 8.[8] A splash pad is a recreational area covered with a non-slip surface containing nozzles and other physical features that can spray, mist, and shoot streams of water, thereby creating a place for recreational water play. See C.R. 8, 16, 23-25. Drains in the surface collect water for re-circulation (C.R. 51-53), which keeps the area safe by preventing standing water. Splash pads are popular at municipal recreation areas, such as parks. C.R. 8.

From 2001 to 2013, respondent Tara Menon was

1992); *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 22 (N.Y. App. Div. 2012); *Nicholson* v. *Yamaha Motor Co., Ltd.*, 566 A.2d 135, 141 (Md. App. 1989); *Hayes* v. *Evergo Tel. Co., Ltd.*, 397 S.E.2d 325, 328 (N.C. App. 1990); *Sandoval* v. *Honda Motor Co., Ltd.*, 527 A.2d 564, 566 (Pa. Super. 1987); *Shoei Kako Co.* v. *Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973).

[7] See *Nuovo Pignone SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Raffa* v. *Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Arco Elec. Control Ltd.* v. *Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); *Meek* v. *Nova Steel Processing, Inc.*, 706 N.E.2d 374, 377 (Ohio App. 1997); *Frankenmuth Mut. Ins. Co.* v. *ACO, Inc.*, 484 N.W.2d 718, 722 (Mich. App. 1992); *Honda Motor Co.* v. *Superior Court*, 10 Cal. App. 4th 1043, 1046-47 (Cal. Ct. App. 1992).

[8] Parts of the record outside the Joint Appendix are cited by the page number of the Clerk's Record (C.R.) in the lower courts.

an employee of Water Splash. J.A. 40 ¶ 2. In July 2012, during the middle of her tenure with Water Splash, Menon submitted bids to the City of Galveston to construct splash pads at two parks. J.A. 40 ¶ 3. However, Menon submitted these bids as a sales manager for a Water Splash competitor: South Pool & Spa, Inc. J.A. 40 ¶ 3. Notably, Menon did not have Water Splash's permission to submit these bids, which included trade names and product design information belonging to Water Splash. J.A. 40 ¶ 4.

At the time of those bids, Water Splash had an exclusive distributor agreement with a business known as Adventure Playground. J.A. 40 ¶ 5. With Water Splash's permission, Adventure Playground also submitted bids for the Galveston projects using Water Splash's trade names and design information. *Ibid.* In each case, however, Adventure Playground lost the bid to South Pool and Spa. J.A. 40-41 ¶¶ 6-7.

Water Splash terminated Menon in February 2013. J.A. 41-42 ¶ 10. Even then, however, Menon continued to use and disseminate Water Splash's proprietary information. *Ibid.* In one instance, she sent Water Splash designs to a Turkish company known as AquaTronics, then asked it to modify the plans to make the resulting products look less like Water Splash's own. J.A. 41-42 ¶ 10.

C. Lower Court Proceedings

On February 12, 2013, Water Splash filed suit in Galveston County District Court against Menon, a Canadian resident. J.A. 1; C.R. 6.

To obtain a valid judgment against Menon, Water Splash had to serve her with process. Under federal law, "if the internal law of the forum state"—here,

Texas—"defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." *Schlunk*, 486 U.S., at 700. This results follows because the Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Id.*, at 699 (citing U.S. CONST., Art. VI (Supremacy Clause)).

Under Texas law, a plaintiff can serve a foreign defendant in several ways, including (1) by certified mail, return receipt requested, either by sending it to the defendant directly,[9] or, if certain conditions are met,[10] by sending it to the Texas secretary of state;[11] (2) by complying with the provisions of any applicable treaty;[12] and, if certain other conditions are met, (3) by other court-ordered means.[13] As next discussed, Water

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[9] TEX. R. CIV. P. 108(a)(1)(c); TEX. R. CIV. P. 106(a)(2).

[10] If a plaintiff's claims against a nonresident defendant arise from the defendant's business activities in Texas, the Texas secretary of state becomes the defendant's agent for service of process if it has no business presence or appointed agent in Texas. TEX. CIV. PRAC. & REM. CODE § 17.044(b); see also *id.* §§ 17.026(a), 17.045(a).

[11] Under Texas law, service through the Texas secretary of state is not complete until the secretary of state actually sends process to the non-resident. *Whitney* v. *L & L Realty Corp.*, 500 S.W.2d 94, 95 (Tex. 1973). In default judgment proceedings, a certificate from the secretary of state (a "Whitney" certificate) constitutes conclusive proof (absent fraud or mistake) that the nonresident defendant was served. *Capitol Brick, Inc.* v. *Fleming Mfg. Co., Inc.*, 722 S.W.2d 399, 401 (Tex. 1986).

[12] TEX. R. CIV. P. 108(a)(1)(d).

[13] Texas law allows citation by publication when a defendant is transient, has no known residence, is absent from (or a nonresident of) the State, and other allowed efforts have failed. TEX. R.

Splash employed all of these methods here. Because each method required the transmission of documents abroad in order to effectuate service, the Hague Service Convention applies to this case.[14]

1. District Court Proceedings

In its original petition, Water Splash raised state law claims against Menon and her other employer, South Pool and Spa (a Texas corporation), for unfair competition, conversion, tortious interference with prospective business relations, and conspiracy. J.A. 1; C.R. 1, 5-6.

On the same day suit was filed, Water Splash obtained a temporary restraining order against South Pool and Spa and Menon (but only in her capacity as South Pool and Spa's agent), enjoining them from using Water Splash's name or designs without permission. C.R. 136-37. On February 22, 2013, the district court entered an agreed temporary injunction, which extended the TRO during district court proceedings.

CIV. P. 109. When service by publication is authorized, "the court may, on motion, prescribe a different method of substituted service, if the court finds, and so recites in its order, that the method so prescribed would be as likely as publication to give defendant actual notice." TEX. R. CIV. P. 109a.

[14] By contrast, compliance with the Hague Service Convention is not required when state law authorizes service on the domestic agent of a foreign defendant and provides that such service is complete when the *domestic agent* is served (assuming due process concerns are otherwise satisfied). See *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 707 (1988). Even where state law does not require transmittal of documents abroad for service, however, there may be reason for a plaintiff to effectuate service in compliance with the Convention. See *Schlunk*, 486 U.S., at 706 ("[P]arties that comply with the Convention ultimately may find it easier to enforce their judgments abroad.").

C.R. 146-48.

In February 2013, Water Splash served Menon by mailing citation with a copy of its original petition to the Texas secretary of state. J.A. 23. The secretary of state received these materials on February 15, 2013, and forwarded them on February 21, 2013 to Menon's address in Canada by registered mail, return receipt requested. J.A. 23. On April 1, 2013, these materials were returned to the secretary of state with the notation "Non Reclame" (unclaimed). J.A. 23.

On May 10, 2013, pursuant to Texas Rule of Civil Procedure 109a, Water Splash asked the court to authorize substitute service of process on Menon in Canada by first-class mail; certified mail (return receipt requested); Federal Express; and email to four addresses she had been known to use in the prior year. J.A. 18-22. On May 17, 2013, the court granted the motion and ordered that service could be effectuated by first-class mail; certified mail (return receipt requested); Federal Express; and email. J.A. 37-38.

On May 20, 2013, Water Splash used each of those methods to send Menon a copy of the court's order along with Water Splash's original petition and first amended petition, which raised additional claims and added an additional defendant (South Pool and Spa's owner/operator Muhammed "Mike" Tello). C.R. 167-301, 303, 307-18. But the emails were not acknowledged, and the Federal Express package and registered mail were both returned, the latter with a notice stating "Unclaimed" and "Non réclamé." C.R. 314-15.

During the pendency of the case, Water Splash obtained through discovery an email showing Menon's actual notice of the lawsuit beginning on the date suit was filed. C.R. 562, 575 (February 12, 2013 email from

Menon to South Pool and Spa and its counsel, asking to discuss "this litigation").[15] Even so, Menon failed to answer or otherwise appear in the lawsuit and on August 1, 2013, Water Splash moved for a default judgment against her. J.A. 1; C.R. 303-24.

On September 25, 2013, the trial court entered a default judgment and permanent injunction against Menon, which was interlocutory because Water Splash's claims against South Pool and Spa and Tello remained pending. J.A. 39-45. In the default judgment, the district court found that Menon's conduct breached the confidentiality provision of her employment agreement. J.A. 41 ¶ 8. The court also found that, but for South Pool and Spa's bid, Adventure Playground would have won the two park contracts, and that, in turn, Water Splash lost $75,000-$90,000 in income it otherwise would have earned from the sale of its products. J.A. 40-41 ¶¶ 6-7, 9.

The district court held Menon liable on Water Splash's original claims of unfair competition, conversion, tortious interference with prospective business relations, and conspiracy, as well as the claims Water Splash added in its amended petition for fraud, breach of fiduciary duty, and violation of the Texas Theft Liability Act. J.A. 42 ¶¶ 1, 2.

The court found that Menon's conduct was intentional and malicious, and awarded actual damages ($60,000), exemplary damages ($60,000), attorneys' fees, and interest. *Ibid.*; J.A. 42-43 ¶¶ 1-5. The court

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[15] The next day, Menon again emailed South Pool and Spa and stated that its manufacturer needed to make "some changes to the design somewhere so they don't look like [Water Splash's products]" and that Water Splash would "regret this legal action." J.A. 27; CR563, 578.

also entered a permanent injunction barring Menon and those subject to her control from using Water Splash's intellectual property, including product designs and customer lists. J.A. 43-45

In October 2013, Water Splash reached a settlement with the other defendants, which included their agreement on a permanent basis to the terms of the temporary injunction. C.R. 495. On October 28, 2013 (J.A. 2), Menon filed a motion for new trial (C.R. 497-555), which argued that Menon was not properly served because, among other reasons, "requests for service in Quebec of judicial or extrajudicial documents under the Hague Convention must be sent to the Central Authority for Quebec." C.R. 499-500. Menon also argued that, even if she had been properly served, a new trial should be granted because her failure to appear was not intentional or due to conscious indifference but was the result of a mistake or accident; she had a meritorious defense; and a new trial would not prejudice Water Splash. C.R. 501-06.

On January 3, 2014, the district court denied Menon's motion for new trial. J.A. 2; C.R. 584. On December 31, 2013, the district court dismissed Water Splash's claims against South Pool and Spa and Mike Tello (based on the settlement) and made final the default judgment against Menon. J.A. 46-47. On January 5, 2014, Menon filed a notice of appeal. C.R. 585.

2. Appellate Court Proceedings

On appeal, Menon argued that the default judgment should be set aside because Water Splash's attempts to serve process were required to comply with the Hague Service Convention by virtue of the Supremacy Clause, but that they had failed to do so because the Convention does not allow service of process

by mail, private delivery service, or email. Appellant's Brief at 14-25. In opposition, Water Splash argued that service by mail was permitted under the Hague Service Convention. Appellee's Brief at 2-11.

On June 30, 2016, in a divided opinion, the 14th Court of Appeals, Houston, Texas, vacated the default judgment, holding that the Hague Service Convention does not permit service of process by mail. J.A. 49-93. The panel majority defined "[t]he question before us" as turning on "the meaning attributed to 'send' and 'service'" under Article 10(a) of the Hague Service Convention. J.A. 53. The court acknowledged a split of authority (J.A. 54-55) and decided to follow the approach of the Fifth Circuit,[16] which previously held that "send" did not have the same meaning as "service." The panel majority summarized the Fifth Circuit's reasoning as follows:

> "In [*Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 383 (5th Cir. 2002)], plaintiff attempted service by mailing service of process to the defendant's office in Italy. *See Nuovo*, 310 F.3d at 383. Arguing that service by mail violated Fed. R. Civ. P. 4(f)(1) because it did not comply with the Hague Convention, the defendant urged that the drafters used the term 'send' in connection with the delivery of judicial documents, but used 'serve,' 'service,' and 'to effect service' in other sections, including article 10. *Id.* The *Nuovo* court discussed how other courts have construed 'send'

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[16] J.A. 55 ("We conclude that the better-reasoned approach is to follow the so-called 'minority view' which adheres to and applies the meaning of the specific words used in article 10(a) and prohibits service of process by mail.").

> and determined that, because 'service' was used throughout the Hague Convention while 'send' was confined solely to article 10(a), this demonstrated that the drafters did not 'intend to give the same meaning to "send" that they intended to give to "service." ' *Id.* at 384."

J.A. 53.

In justifying its conclusion, the panel majority also reiterated two of the Fifth Circuit's supporting rationales. First, the panel majority stated that its conclusion followed from principles of statutory construction:

> " 'Absent a clearly expressed legislative intention to the contrary,' a statute's language 'must ordinarily be regarded as conclusive.' *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct 2051, 64 L.Ed.2d 766 (1980). And because the drafters purposely elected to use forms of the word 'service' through the Hague Convention, while confining use of the word 'send' to article 10(a), we will not presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'
>
> *Nuovo*, 310 F.3d at 384 . . . ."[17]

J.A. 55.

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[17] The panel majority also noted that the Eighth Circuit had reached the same result using essentially the same reasoning. J.A. 56 (citing *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989)).

Second, the panel majority reasoned that it was unlikely that the drafters of the Hague Service Convention would have put in place specific methods of service in Articles 2 through 7 (by a Central Authority or diplomatic channels) "'while simultaneously permitting the uncertainties of service by mail.'" J.A. 56 (quoting *Nuovo Pignone*, 310 F.3d, at 385).[18] The panel majority then vacated the trial court's judgment and remanded for further proceedings. J.A. 58.

Justice Tracy Christopher dissented. As a threshold matter, she determined that the stated purpose of the Hague Service Convention inherently limited the Convention's scope to service of process transmittals. J.A. 70-72 (citing *Schlunk*, 486 U.S., at 700-01). She thus concluded that "send[ing] judicial documents" meant "serv[ing] judicial documents." J.A. 72.

In addition, the dissent noted that because treaties are contracts between sovereign States, their interpretation is governed by different principles than questions of pure statutory construction, including principles that examine non-textual sources of meaning. J.A. 66-70. The dissent then examined such sources, including the history of prior treaties that led to the Convention, the negotiation and drafting of the Convention itself (including the views of its delegates and reporter), as well as the post-ratification understanding of the Convention by its signatories—including the United States—and their courts and determined that, apart from some domestic courts, all of these sources unanimously supported the view that Article 10(a) permits service by mail. J.A. 77, 73-79.

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[18] The panel majority also stated that this result was consistent with other state and federal decisions in Texas. J.A. 57-58.

The dissent then criticized the countervailing view, including state and federal decisions relied upon by the majority, concluding that cases like *Nuovo Pignone*, *supra*, "follow[] none of the governing precepts of treaty construction." J.A. 81; see J.A. 79-93.

SUMMARY OF ARGUMENT

The stated purpose of the Hague Service Convention is to establish methods for transmitting documents abroad in order to effectuate service. The treaty's negotiation and drafting history confirms that its scope is limited and does not apply to transmittals of documents for non-service purposes. See *Schlunk*, 486 U.S., at 700-01. In turn, the limited scope of the Convention confirms that all transmittals of judicial documents regulated by it must be "service" transmittals, whether the term it uses to describe the transmittal is "send," "service," or anything else. Contrary decisions from lower courts make the fundamental mistake of reading the literal language of Article 10(a) without regard to the specific purpose of the treaty.

The alternative conclusion that "send" at least does not *exclude* the concept of service is supported by other language in Article 10. In particular, the opening proviso of Article 10 lets a State formally object to the use of postal channels for transmitting judicial documents. On the one hand, if Article 10(a) permits service by mail, there is a cognizable basis for a State to object to the use of its postal channels, as the act of service may be seen to infringe upon State sovereignty. On the other hand, if Article 10(a) does not permit service by mail, there is no obvious reason for a State to object to the use of its postal channels for non-service communications, nor would any such objection appear to have any practical purpose.

The history of the prior treaties that led to the Convention also supports the above conclusions. The Convention was a revision of those treaties, and Article 10(a) in particular was based on an analogous provision from a 1954 treaty that was written in French and that more obviously allowed service by mail.

When the Convention was drafted in 1964, however, the 1954 provision was both rearranged and translated from French to English. Although these revisions inexorably led to the present interpretative question, the negotiating and drafting history of the Convention evidences no intent that the revisions were meant to abandon a long-standing understanding that service by mail was permissible absent objection. Indeed, all evidence of the signatories' shared expectations, both at and after the time of adoption—and including the views of both the United States and Canada—reflect the expectation that Article 10(a) permits service by mail.

ARGUMENT

I. The scope of the Convention and the text of Article 10(a) confirm that its use of "send" means or includes the concept of service.

A treaty is in the nature of a contract rather than a legislative act; accordingly, its interpretation is a matter of discerning the contracting parties' intent.[19]

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[19] *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."); *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232-33 (2014) (" 'A treaty is in its nature a contract between . . . nations, not a legislative act.' " (quoting *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829), *overruled in part by United States* v. *Percheman*, 32 U.S. 51, 89

As with most questions of intent, the starting point for treaty interpretation is evidence from the text itself, including statements of purpose, the structure of the treaty and its provisions, and the ordinary meaning of its words in context.[20]

A. "Send" means "serve" because the Convention's scope was limited to regulating service.

1. The stated purpose of the Convention indicates an intent to limit its scope to service transmittals.

The Convention's purpose, as stated in its the preamble,[21] was to create faster and simpler means of ensuring timely notice of documents transmitted abroad

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(1833)).

[20] See *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987) ("We therefore begin 'with the text of the treaty and the context in which the written words are used.' " (quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985))); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 168-69 (1999) ("We conclude that the Government's construction of Article 24 is most faithful to the Convention's text, purpose, and overall structure."); *Tseng*, 525 U.S., at 169 (confirming "cardinal purpose" of treaty—achieving "uniformity of rules governing claims arising from international air transportation"—by examining treaty's preamble, which "recognized the advantage of regulating in a uniform manner the conditions of . . . the liability of the carrier").

[21] Consistently, the title of the treaty is "Convention on the *Service* Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters." J.A. 5 (emphasis added); cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (noting that " 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947)).

for service:

> "The States signatory to the present Convention,
>
> Desiring to create appropriate means to ensure that judicial and extrajudicial documents *to be served abroad* shall be brought to the notice of the addressee in sufficient time,
>
> Desiring to improve the organisation of mutual judicial assistance for *that purpose* by simplifying and expediting the procedure,
>
> Have resolved to conclude a Convention to *this effect* and have agreed upon the following provision."

J.A. 5 (emphases added); see *Schlunk*, 486 U.S., at 702-04 (assessing purpose by examining preamble). Because the above statements of purpose are restricted to the regulation of service, there is no reason to infer that any transmittals of judicial or extrajudicial documents regulated by the Convention would be for any purpose beyond efforts to effect service.

2. The negotiating and drafting history of the Convention confirms this conclusion.

The treaty's negotiation and drafting history confirms that its regulation of transmittals of judicial and extrajudicial documents is limited to service purposes. *Schlunk*, 486 U.S., at 700 (examining Hague Service Convention's drafting history and negotiations in determining its scope).[22] In *Schlunk*, this Court examined the drafting history of Article 1:

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[22] See also *Medellín* v. *Texas*, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among

> "The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad. . . .
>
> The delegates . . . criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. . . . The final text of Article 1 . . . eliminates this possibility and applies only to documents transmitted for service abroad.
>
> The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended."

Schlunk, 486 U.S., at 700-01 (italics in original; bold, underlining, and paragraph breaks added); see Convention, Art. 1 [J.A. 5] ("The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.").

Based on this analysis, the Court concluded that the drafting history "eliminate[d] the possibility" that

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sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))).

the Convention could apply to transmissions abroad "that do not culminate in service" (*i.e.*, non-service transmissions). *Ibid.*; see *Schlunk*, 486 U.S., at 710 (Brennan, J., concurring) ("[The Hague Service Convention] covers not every transmission of judicial documents abroad, but only those transmissions abroad that constitute formal 'service.' ").

Accordingly, the *scope* of the Convention is limited to transmittals made to effectuate service. Thus, there is no reason to interpret any of its transmittal provisions for judicial or extrajudicial documents as involving something other than service, regardless of the specific verb ("send," "serve") that may be used therein. For these reasons, "send" in Article 10(a) should be interpreted to mean "serve." Alternatively, and at a very minimum, the specific and limited purpose of the Convention at least means that "send" cannot be read to *exclude* the concept of service; otherwise Article 10(a) would be superfluous.[23]

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[23] *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (noting canon against superfluity as "one of the most basic interpretive canons"); see *New York State Thruway Auth.* v. *Fenech*, 94 A.D.3d 17, 20 (N.Y. App. Div. 2012) ("[T]he express limitation of the Hague Convention's scope to the service of documents renders article 10(a) meaningless if it is interpreted as applying only to documents that are sent, but not served, by mail."); *Hammond* v. *Honda Motor Co., Ltd.*, 128 F.R.D. 638, 641 (D.S.C. 1989) ("Forbidding direct service by mail would render subpart (a) extraneous material."); *Shoei Kako Co.* v. *Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973) ("[The Convention] purports to deal with the subject of service abroad of judicial documents. The reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service.").

The same conclusion may be reached even if the scope of the

3. Contrary decisions ignore the limited scope of the Convention.

Domestic courts determining that Article 10(a) does not permit service by mail primarily rely on the fact that the English version of the Convention uses the terms "serve" and "service" repeatedly, yet uses "send" just once. From that, they conclude that the drafters must have intended the terms to have different—indeed, mutually exclusive—meanings. See, *e.g.*, *Graphic Styles/Styles Intern. LLC* v. *Men's Wear Creations*, 99 F. Supp. 3d 519, 522-23 (E.D. Pa. 2015) ("[W]here the drafters from numerous countries used the words 'serve' or 'service' in fifteen articles of a treaty as well as in Article 10, subsections (b) and (c), it is facile to conclude that they merely chose to select the words 'to send' in Article 10(a) by mistake.").

Such reasoning can be traced to the following principle of statutory construction:

Convention somehow embraced non-service transmittals because the meaning of "send" is at least broad enough to encompass service. In particular, when used as a verb, "serve" is narrower than, but not inconsistent with, more general verbs of transmission, including "send," "mail," or "deliver." Indeed, procedural rules implementing different forms of service often are written in such terms. See TEX. R. CIV. P. 106(a)(2) (process may be served "by ... *mailing* [it] to the defendant by registered or certified mail, return receipt requested" (emphasis added)); TEX. R. CIV. P. 106(a)(1) (process may be served by "*delivering* [it] to the defendant, in person") (emphasis added)); TEX. CIV. PRAC. & REM. CODE § 17.045(d) (for the Texas secretary of state to effectuate service on a non-resident defendant "process or notice must be *sent* by registered mail or by certified mail, return receipt requested") (emphasis added)); see also FED. R. CIV. P. 4(e)(1) (generally allowing service to be accomplished pursuant to state law, unless provided otherwise by federal law).

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

But this presumption is necessarily rebutted when substantial evidence of scope and purpose, as discussed above, leads to a contrary interpretation:

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure."

Cent. Hanover B. & T. Co. v. *C.I.R.*, 159 F.2d 167, 169 (2d Cir. 1947) (Hand, J.). Here, the Convention's specific scope and purpose are limited to the regulation of transmittals for effectuating service abroad. Consequently, there is no basis to apply the interpretive presumptive that "send" must have a different meaning from "serve."[24]

B. The text of Article 10(a) confirms that "send" does not exclude the concept of service.

Independent of the scope of the Convention, other

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[24] That said, even if the Convention's scope were not limited to service transmittals, "send" may be interpreted to include service transmittals. See, *supra*, note 23. In that case, "send" and "serve" would at least have different meanings, thus satisfying any presumption that different words usually do.

textual evidence shows that "send" in Article 10(a) does not *exclude* "service." In particular, the opening proviso of Article 10 makes clear that a State can object to the use of the postal channels to "send" judicial documents under Article 10(a). J.A. 8. In turn, Article 21 requires that States make any such objections known by informing the Ministry of Foreign Affairs of the Netherlands upon or after adoption. J.A. 13.

Of course, if "send" means or includes "serve," this right of objection makes sense to avoid any potential infringements on the sovereignty of civil law States. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 cmt. b (1987) ("Civil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own law."); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

By contrast, if the meaning of "send" excludes the concept of service, then any right of objection would seemingly embrace only transmittals of judicial documents for non-service purposes (*i.e.*, where official notification is neither required nor sought). Yet if official notice—including any rights it may secure—is not required or sought by a particular transmittal, it is unclear what reason a State might have for objecting to the form of its communication. And even if a State *did* object to its postal channels being used for non-service communications, an objection under the Convention would appear ineffective to either prevent them or impose negative consequences. E.g., *Shoei Kako Co.* v. *Superior Court*, 33 Cal. App. 3d 808, 821 (Cal. Ct. App. 1973) ("The mails are open to all.").

Consistent with the above argument, there is no evidence in the negotiation or drafting history of the Convention that any signatory desired to prevent the use of postal channels for non-service transmittals. Rather, as next shown, the very opposite is true: the signatories shared the expectation that the Convention would allow service by such channels, absent formal objection by the State of destination.

II. The signatories shared the expectation that Article 10(a) permitted service by mail.

In addition to a treaty's text and drafting history, other evidence of the contracting parties' "shared expectations" may be employed in order to aid in its interpretation.[25]

A. Treaties that led up to the Convention allowed service by mail.

The contracting parties' intent may be evidenced by historical events leading up to the treaty. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-32 (1943) ("[T]o ascertain [a treaty's] meaning we may look beyond the written words to the history of the treaty . . . ."); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (same).

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[25] *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1233 (2014) ("It is our 'responsibility to read the treaty in a manner "consistent with the *shared* expectations of the contracting parties." ' " (quoting *Olympic Airways* v. *Husain*, 540 U.S. 644, 650 (2004) (quoting *Air France* v. *Saks*, 470 U.S. 392, 399 (1985); emphasis added))); *Zicherman* v. *Korean Air Lines Co., Ltd.*, 516 U.S. 217, 223 (1996) (rejecting proposed treaty interpretation that was "implausible" and "unlikely" in view of "the shared expectations of the contracting parties").

Here, that history includes three prior treaties. In particular, the French text of the Convention was largely copied from prior treaties of 1896, 1905, and 1905, which were drafted solely in French. See Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 333 (2010).

The language used in the earlier treaties sheds light not only on the signatories' shared expectations, but also helps explain why the English version of Article 10(a) was not drafted as precisely as it might have been. The Hague Conference explains what happened as follows:

> "the 1965 Convention was the first text drawn up by the Hague Conference to include an official English version and relating to service abroad. Nevertheless, the verb '*adresser*' used in the French version of Article 10(a) of the 1965 Convention, rendered in English by the verb '*send*,' had been used in substantially the same context in the three predecessor treaties drafted in The Hague (the Convention of 14 November 1896 on Civil Procedure, the Convention of 15 July 1905 on Civil Procedure, replacing the 1896 Convention, and the Convention of 1 March 1954 on Civil Procedure, itself replacing the 1905 Convention).
>
> While '*adresser*' is indeed not equivalent to the concept of '*service*,' it certainly does not exclude the latter. On the contrary, it has been consistently interpreted as meaning service or notice. Accordingly, neither the letter nor the history of the Hague Conventions can be used to sup-

> port the [contrary] approach applied in *Bankston* [v. *Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) (which held that Article 10(a) did not permit service by mail)]."[26]

Because these prior conventions were written in French, and because the Hague Service Convention was written in both French and English, aspects of the French language explained above are relevant to any inquiry into the meaning of Article 10(a).[27]

Separate and apart from these nuances of translation, there was also a structural difference between the 1954 treaty and the Convention that helps explains the imprecision of Article 10(a). This can be seen by examining the following English translation of Article 6 of the 1954 Convention on Civil Procedure, which is unofficial but provided by the Conference:

> "The provisions of the foregoing Articles shall not interfere with -

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[26] PRACTICAL HANDBOOK (2006), *supra* note 1, ¶ 222 (citing George A.L. Droz, "*Mémoire sur la notification des actes judiciaires et extrajudiciaires à l'étranger*," in 3 THE HAGUE, PROCEEDINGS OF THE TENTH SESSION 12-13, 15-17 (*Imprimerie Nationale* 1965)) (paragraph breaks added).

[27] *Air France* v. *Saks*, 470 U.S. 392, 399 (1985) ("We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists."). Because the Hague Service Convention was drafted "in the English and French languages, both texts being equally authentic," the negotiating and drafting history of the Convention's text in both languages should be considered. See *Schlunk*, 486 U.S., at 699-01 (considering French terms proposed for inclusion and examining the meanings given to them "in some countries, such as France" and "in others, such as the United States").

> (1) the freedom to send documents, through postal channels, directly to the persons concerned abroad;
>
> (2) the freedom of the persons concerned to have service effected directly through the judicial officers or competent officials of the country of destination;
>
> (3) the freedom of each State to have service effected directly by its diplomatic or consular agents of documents intended for persons abroad.
>
> In each of these cases, the freedom mentioned shall only exist if allowed by conventions concluded between the States concerned or if, should there be no convention, the State on the territory of which service must be effected does not object. That State may not object when, in the cases mentioned in sub-paragraph 3 of the above paragraph, the document is to be served without any compulsion on a national of the requesting State."

Hague Convention on Civil Procedure, Art. 6 (1954).[28]

Because provision (1) uses the word "send," it also suffers—at least in isolation—from any lack of clarity possessed by Article 10(a) of the Hague Service Convention. In context, however, any confusion disappears because the final paragraph quoted above clarifies that Article 6 is describing three means of *service*.

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[28] This English translation is available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=33.

"In *each* of these cases, the freedom mentioned shall only exist if . . . the State on the territory of which *service must be effected* does not object." (Emphasis added.)

In 1964, the Conference drafted Article 10(a) using nearly same French words as Article 6(1) of the 1954 treaty.[29] But in the Hague Service Convention, the Conference moved the language concerning a State's right to object from the end of Article 6 of the 1954 Convention to the beginning of Article 10 of the Hague Service Convention. At the same time, the Conference omitted the clarifying language from the last paragraph of Article 6 of the 1954 treaty.

Some might describe the omission of the clarifying language and the use of a less-than-precise English term as "careless drafting." Cf. 2 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL 373 (2000). But it does help explain why the signatories' shared expectations—reflected by all other evidence of intent, as next discussed—were not expressed in the English text as precisely as they might have been.

B. The members of the Conference intended the Convention to permit service by mail.

The shared intentions of the contracting parties may be evidenced by contemporaneous statements

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[29] Compare Article 10(a) of the Hague Service Convention in French: "*à la faculté d'adresser directement, par la voie de la poste, des actes judiciaires aux personnes se trouvant à l'étranger*" (*available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17), with Article 6(1) of the 1954 Convention on Civil Procedure in French: "*à la faculté d'adresser directement, par la voie de la poste, des actes aux intéressés se trouvant à l'étranger*" (*available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=33).

from conference delegates and the official reporter (Rapporteur) for the Hague Conference session in question. *Schlunk*, 486 U.S., at 701-703 (considering statements of both the Rapporteur and Philip Amram, head of the United States delegation to the Convention); *Id.*, at 709-10 & n.1, 714, 716 (Brennan, J., concurring) (same); *Société Nationale*, 482 U.S., at 530 n. 13 (1987) (considering statements of Rapporteur).

Here, such evidence further supports the conclusion that "send" either means or includes the concept of service:

1. The Rapporteur's Report

As translated by one commentator, the official French report on the treaty's preliminary draft stated:

> " 'The provision of paragraph 1 [Article 10(a) in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail.' "[30]

Yet if Article 10(a) was expected to include service by telegram—*i.e.*, so as not to be "limited to registered mail"—then Article 10(a) necessarily was intended to permit service by mail.

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[30] Patricia N. McCausland, Note and Comment, *How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 12 PACE L. REV. 177, 186 n.67 (1992) (quoting and translating 3 *Actes et Documents de la Dixième Session* (*Conférence de la Haye de Droit International Privé*) 90 (1964)).

And even more clearly, "[a]ccording to the official Rapporteur's report, the first paragraph of Article 10 of the draft Convention, which 'except for minor editorial changes' is identical to Article 10 of the final Convention, was intended to permit service by mail." *Brockmeyer* v. *May*, 383 F.3d 798, 802–03 (9th Cir. 2004) (citing 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE § 4–3–5, at 204-05 (2000)).

2. The U.S. Delegation's Report

Philip Amram, the head of the United States delegation and its chief negotiator, reported to the Senate Foreign Relations Committee that:

> "use of the central authority is not obligatory. Optional techniques may be used, for example—
>
> (1) diplomatic and consular channels (arts. 8 and 9)
>
> (2) unless the requested State objects, direct service by mail or transmission to a process server for service (art. 10)."

Philip W. Amram, Statement to Senate Committee on Foreign Relations, *quoted in Convention on the Service Abroad of Judicial and Extrajudicial Documents*, S. EXEC. REP. NO. 90-6, at 13 (1967); see *Schlunk*, 486 U.S., at 703 (relying on Amram as a member of the U.S. delegation); *Schlunk*, 486 U.S., at 710, 714 (Brennan, J., concurring) (same).

3. The Executive Branch's View

With respect the United States' expectations, "great weight" is given to the Executive Branch's interpretation of a treaty. *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive

Branch's interpretation of a treaty 'is entitled to great weight.'" (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); *Medellín* v. *Texas*, 552 U.S. 491, 513 (2008) (same).

When the Hague Service Convention was negotiated, signed, and ratified, the United States Secretary of State was Dean Rusk. In his official report to President Johnson, he stated: "Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service." Dean Rusk, Secretary of State, Letter to President Lyndon B. Johnson (n.d.), *reprinted in* S. EXEC. DOC. C, 90th Cong., 1st Sess., at 5 (1967).[31]

C. The signatories' post-ratification viewpoints are consistent with their prior expectations.

Courts also consider signatories' post-ratification views as evidence of their intent. *Medellín*, 552 U.S., at 507 (" 'Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996))).

The post-ratification views of the signatories are consistent with the above evidence of their shared expectations:

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[31] President Johnson's letter transmitting the Convention and urging its ratification is reprinted in *Judicial Assistance: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 61 AM. J. INT'L L. 799 (1967).

1. The Executive Branch's View

When a federal court of appeals first held that Article 10(a) did not permit service by mail (*Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989)), the United States Department of State informed administrators of state and federal courts that:

> "We . . . believe that the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country. . . ."

Letter from U.S. Dep't of State Deputy Legal Adviser Alan J. Kreczko to the Administrative Office of the U.S. Courts and the National Center for State Courts (Mar. 14, 1990), *excerpted in United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan Under Hague Service Convention*, 30 I.L.M. 260, 261 (1991).[32]

2. The Views of Other Signatories

The views of other signatories are entitled to "considerable weight." *Abbott* v. *Abbott*, 560 U.S. 1, 16 (2010) ("In interpreting any treaty, '[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight." ' " (quoting *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (quoting *Air France* v. *Saks*, 470 U.S. 392, 404 (1985))). Post-rati-

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[32] See also *Brockmeyer* v. *May*, 383 F.3d 798, 803 (9th Cir. 2004) ("State Department circulars also indicate that service by mail is permitted in international civil litigation.").

fication, these views may be seen from post-Convention reports by the Hague Conference,[33] including its Special Commission, which repeatedly convened to examine the Hague Convention in actual practice:

In 1977, the Special Commission stated that "[t]he States which object to the utilisation of service by post sent from abroad are known thanks to the declarations made to the [Dutch] Ministry of Foreign Affairs" and that most members "made no objection" to direct mail service.[34]

In 1992, the Hague Conference stated that: "The views of some of the courts in the United States [finding that Article 10(a) does not permit service by mail] . . . contradict what seems to have been the implicit understanding of the delegates at the 1977 Special Commission meeting, and indeed of the legal literature on the Convention and its predecessor treaties."[35]

Then, at the Special Commission's 1989 meeting,

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[33] Cf. *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 n. 40 (1993) (examining scholar's references to the Office of United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), in construing a United Nations Treaty).

[34] Hague Conference on Private International Law, *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (21-25 November 1977), *reprinted in* 17 I.L.M. 319, 326, 329 (1978), *available at* http://hcch.e-vision.nl/upload/scrpt14_77e.pdf.

[35] Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 44 (2d ed. 1992) (footnotes omitted).

> "[i]t was pointed out that the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article [10(a)] in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified."[36]

In 2003, the Special Commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels."[37]

In 2006, the Conference stated that "[s]ervice by mail under Article 10(a) is effective if (i) service by mail is allowed by the law of the State of origin and all the conditions imposed by that law for service by mail have been met, and (ii) the State of destination has not objected to the use of Article 10(a)."[38]

In addition, the post-ratification views of other States may be evidenced by their courts' decisions. See *Abbott* v. *Abbott*, 560 U.S. 1, 9-10 (2010) ("This Court's inquiry is shaped by . . . decisions addressing the

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[36] Hague Conference on Private International Law, *Report of the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 On the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 On the Taking of Evidence Abroad in Civil or Commercial Matters* ¶ 16 (Aug. 1989), *reprinted in* 28 I.L.M. 1558, 1561, *available at* http://www.hcch.net/upload/scrpt1989.pdf.

[37] PRACTICAL HANDBOOK (2006), *supra* note 1, App. 6 ¶ 55.

[38] PRACTICAL HANDBOOK (2006), *supra* note 1, ¶ 201.

meaning of 'rights of custody' in courts of other contracting states . . . .").

On this front, several foreign courts, including one in Canada, have held that Article 10(a) permits service by mail:

- *Integral Energy & Envtl. Eng'g Ltd.* v. *Schenker of Canada Ltd.*, 295 A.R. 233 (2001), 2001 WL 454163 (Alberta Queens Bench) ("Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels"), *rev'd on other grounds*, 293 A.R. 327 (2001);
- *Crystal Decisions (U.K.), Ltd.* v. *Vedatech Corp.*, EWHC (Ch) 1872 (2004), 2004 WL 1959749 ¶ 21 (High Court, England) (permitting mail service to defendants in the United States and Japan);
- Case C-412/97, *E.D. Srl.* v. *Italo Fenocchio*, 1999 E.C.R. I-3845 ¶ 6, C.M.L.R. 855 (2000) (Court of Justice of the European Communities) ("Article 10(a) of [the Hague Convention] allows service by post."); and
- *R.* v. *Re Recognition of an Italian Judgment*, I.L.Pr. 15 (2002), 2000 WL 33541696 (Thessaloniki Court of Appeal, Greece) ("It should be noted that the possibility of serving judicial documents in civil and commercial cases through postal channels . . . is envisaged in Article 10(a) of the Hague Convention.").[39]

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[39] The Ninth Circuit cited the pre-2004 decisions in reaching its conclusion that the permissibility of service by mail was the "essentially unanimous view of other member countries of the

D. Other scholarship supports the view that Article 10(a) permits service by mail.

In questions of treaty interpretation, the analysis of scholars may also be persuasive. *Abbott*, 560 U.S., at 18 ("Scholars agree that there is an emerging international consensus on the matter."); *Schlunk*, 486 U.S., at 698, 700, 703 (relying on 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL (1984 and 1 Supp. 1986)).

Bruno A. Ristau was the American delegate to the 1977 Special Commission on the Convention, as well as the head of the American Central Authority. Ristau has written that the language of Article 10(a) regarding the use of "postal channels" was "intended to include service of process." 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE, CIVIL AND COMMERCIAL § 4-3-5 (2000).

Similarly, the two top officials of the Hague Conference have written that the Convention allowed service by mail. Georges A.L. Droz & Adair Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 163-64 (1981). Dyer elaborated on this view in a 1992 letter:

> "The view that Article 10(a) does not allow service of process by mail is, so far as we know at the Permanent Bureau, entirely contrary to the historical interpretation of the 1965 Convention as well as the similar language (in French only) in its predecessors, the 1954 Convention on Civil Procedure and the 1905 Convention on

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Hague Convention" *Brockmeyer* v. *May*, 383 F.3d 798, 802 (9th Cir. 2004).

> Civil Procedure. The idea that the Convention permits service of process by mail, not merely sending of documents, was implicit in the conclusions of the Special Commission which met in November 1977 to consider the operation of this Convention, as well as of the Special Commission of April 1989, which met to consider the operation of both Conventions. Service of process by mail under the Convention has also been upheld by courts in Belgium and we at the Permanent Bureau are not aware of any case, except in the United States, where a court has held that the Convention does not allow service of process by mail abroad."[40]

Other scholars concur. See, *e.g.*, Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 343 (2010) (concluding, after an exhaustive analysis of the history of the Convention, that "the only sensible approach is to find mail service is permissible under the Hague Convention" (citing Gary A. Magnarini, *Service of Process Abroad by the Hague Convention*, 71 MARQ. L. REV. 649, 677 (1988))).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[40] Adair Dyer, First Secretary of the Hague Conference on Private International Law, Letter to Robert B. von Mehren (June 19, 1992), *quoted in* Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits?*, LAW & CONTEMP. PROBS. 13, 17-18 & n.21 (1994).

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JANUARY 17, 2017

RECORDS AND BRIEFS

No. 16-254

In The

Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ Of Certiorari To The Court Of Appeals of Texas, Fourteenth District

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Statement of the Case 1

Summary of the Argument 3

Argument 5

I. The split in the lower courts is a disagreement over (1) what treaty interpretation methodology the Supreme Court should apply to unambiguous treaty text in any treaty, and (2) the proper interpretation of Article 10 of the Hague Service Convention regarding service of process by direct mail without government assistance 5

II. The Constitution's division of powers between the executive, legislative, and judicial branches requires that the text-centric methodology be applied by the judiciary when interpreting unambiguous treaty text 7

III. The judicial branch should not apply customary international law as an aid to interpret unambiguous treaty text unless the legislative branch has authorized the judicial branch to do so. Such use transfers the law-making function from the legislative branch to the judicial branch in violation of the Constitution 13

TABLE OF CONTENTS – Continued

Page

IV. The judiciary should not defer to the executive's view regarding unambiguous treaty text because to do so violates the judiciary's constitutional duty to say what the law is 25

V. There is no ambiguity presented by the text of the Hague Service Convention regarding whether the intent was to allow service of process by direct mail without government assistance 28

VI. Policy concerns support the interpretation of the lower court's reading of Article 10(a).... 45

VII. The problem of Canadian constitutional law and Québec's not implementing the Convention 47

Conclusion 48

TABLE OF AUTHORITIES

Page

CASES:

Abbott v. Abbott, 560 U.S. 1 (2010) 22, 23, 25, 26

Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986) 5

Air France v. Saks, 470 U.S. 392 (1985) 38

Avena and Other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 37 (Mar. 31) 41

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963) 15

Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989) 5

BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) 7

Breard v. Green, 523 U.S. 371 (1998) 22

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 20

Canada Attorney-General for Canada v. Attorney General for Ontario, [1937] 1 D.L.R. 673 48

Capital Cities Communications, Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141 48

Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 24

Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) 32, 37, 38

Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 4, 26, 27

TABLE OF AUTHORITIES – Continued

Page

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 31

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).....*passim*

Factor v. Laubenheimer, 290 U.S. 276 (1933).....38

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).....20

Foster and Elam v. Neilson, 27 U.S. (2 Pet.) 253 (1829).....14

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).....30

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) 27

Helvering v. Hutchings, 312 U.S. 393 (1941).....30

Jones v. Mecham, 175 U.S. 1 (1899).....28

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 32

Koehler v. Dodwell, 152 F.3d 304 (4th Cir. 1998).....5

Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014).....8, 25

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 27

Medellin v. Texas, 552 U.S. 491 (2008) .....*passim*

Nuovo Pignone SpA v. STORMAN ASIA M/V, 310 F.3d 374 (5th Cir. 2002).....5, 31

Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80 (1988).....47

Reid v. Covert, 354 U.S. 1 (1957) 8

TABLE OF AUTHORITIES – Continued

Page

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) 10

Research Sys. Corp. v. IPSOS Publicite, 276 F.3d 914 (7th Cir. 2002) 5

Russello v. United States, 464 U.S. 16 (1983) 30

Sanchez-Llamas (Moises) v. Oregon, 548 U.S. 331 (2006) 22

Smith v. Alabama, 124 U.S. 465 (1888) 19

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 10, 19, 20, 22, 24

Southern Pac. Co. v. Jensen, 244 U.S. 205 (1916) 19

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) 25

Swift v. Tyson, 41 U.S. 1 (1842) 15, 18, 19, 20, 21

The Paquete Habana, 175 U.S. 677 (1900) 16

The Prize Cases, 67 U.S. (2 Black) 635 (1863) 15

The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) 31

The Scotia, 81 U.S. (14 Wall.) 170 (1871) 15

United States v. Alvarez-Machain, 504 U.S. 655 (1992) 16

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) ..... *passim*

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) 15

TABLE OF AUTHORITIES – Continued

Page

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 10

Zivotofsky v. Zivotofsky, 135 S. Ct. 2076 (2015) 9, 10

CONSTITUTION:

U.S. CONST. art. I, § 7 14

U.S. CONST. art. I, § 8, cl. 3 9

U.S. CONST. art. I, § 8, cl. 18 9

U.S. CONST. art. II, § 2, cl. 2 ..... 9, 14

U.S. CONST. art. II, § 8 15

U.S. CONST. art. VI, cl. 2 ..... 8, 28

CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95 48

STATUTES, RULES AND REGULATIONS:

22 U.S.C. § 2370(c) 16

Alien Tort Statute, 28 U.S.C. § 1350 ..... 10, 24

CODE CIV. P. QUÉBEC, art. 138 48

International Child Abduction Remedies Act, 42 U.S.C. § 11601-11610 23

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 11.4(a) (5th ed. 2007) 48

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1986) 15

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note (1987) 41

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Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 4 (Mar. 3) 42

Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) 20

Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) 20

Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501 23

TABLE OF AUTHORITIES – Continued

Page

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

20 U.S.T. 361, 658 U.N.T.S. 169 5

1529 U.N.T.S. 499 (1989) 1

art. 1 ..... 35, 39

art. 8 ..... 33, 35

art. 10 ..... *passim*

art. 21 ..... 1, 33, 36, 40

John Finnis, NATURAL LAW & NATURAL RIGHTS 26-29 (2d ed. 2011) 20

Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW 1335-1341 (3d ed. 2000) 20

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 (July 9) 41

Ole Lando & Hugh Beale, THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, Art. 5:101 (2000) 43

RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) 41

THE DECLARATION OF INDEPENDENCE, preamble (U.S. 1776) 20

THE FEDERALIST NO. 78 (Alexander Hamilton) 24

TABLE OF AUTHORITIES – Continued

Page

VIENNA CONVENTION ON THE LAW OF TREATIES
1155 U.N.T.S. 331 41
art. 31 42
art. 31(1) 41
art. 31(2) 41
art. 32 42
art. 33 44

STATEMENT OF THE CASE

The Statement contained in the Brief for Petitioner is accurate except that the following should also be noted.

1.

Page 6 of the Brief for Petitioner states:

> Canada – the foreign State of destination – acceded to the Convention in 1989 and, pursuant to Article 21, filed an official declaration with the Government of the Netherlands, which stated that "Canada does not object to service by postal channels" under Article 10(a). 1529 U.N.T.S. 499 (1989).

Although this is true, Menon argued in the Fourteenth Court of Appeals and the Texas Supreme Court that as a matter of Canadian constitutional law, the law of Québec, with no implementing legislation, does not permit service of process by mail without going through Canadian and Quebecer government channels. Aplt. Br. 13, 28-32; Resp. Pet. Rev. 6-7, 15-18. More specifically, Menon argued that although the Convention was adopted by Canada, it has not been fully implemented by the province of Québec – as the Canadian constitutional structure requires – and therefore service on Menon in Québec must be through a Québec judge or "*l'huisser,*" not by direct mail. *Id.* The court of appeals did not reach this issue because the default judgment against Menon was reversed based on Menon's argument that the Convention does not authorize

service of process by direct mail regardless of Canadian constitutional treaty implementation requirements. J.A. 55, 58.

Thus, the above quoted portion of the Brief of Petitioner, although correct as far as Canada's national government is concerned, omits the important point that Québec's provincial government must accede to international treaties regarding the subject of service of process upon Quebecer citizens.

2.

The trial court's findings summarized in the Statement of Facts portion of the Brief for Petitioner on pages 7 through 8 are based on the trial court's findings upon Water Splash's motion for default, not after a contested hearing or trial.

Thus, although the Brief of Petitioner is correct in stating that these findings of fact are contained in the record, it is relevant that the findings are based on a no-answer default proceeding.

3.

Page 7 of the Brief of Petitioner states that Menon was employed by Water Splash "from 2001 to 2013." The quote should read "from 2011 to 2013." This is a typographical error.

SUMMARY OF THE ARGUMENT

The majority opinion from the Texas court of appeals, in interpreting the Hague Service Convention, concluded that it does not allow for a plaintiff to effectuate service of process by direct mail without government assistance. In deciding whether that interpretation is correct the Supreme Court should first determine whether a court that is interpreting unambiguous treaty text may resort to extra-textual materials. Water Splash and the dissenting opinion from the lower court say yes, whereas Menon and the majority opinion say no. Resort to extra-textual materials to interpret unambiguous treaty text violates the Constitution's separation of powers. The law-makers expressed their intent to adopt law for the nation as stated in the unambiguous treaty text. If an ordinary reading of that text results in only one meaning, the judiciary usurps the law-making function by imposing a different meaning by use of materials that are not the language actually adopted by the lawmakers.

The text contained in the Convention regarding service of process by direct mail without government assistance is unambiguous and supports the lower court's conclusion. Moreover, a reading of the text as a whole indicates that service of process was intended to be through the assistance of the simplified government offices specifically created under the Convention with the stated purpose of assisting foreign litigants to effectuate service of process. Water Splash's view is that the Convention was set up to create a government office to assist in effectuating service so that the

government office can then *not* be used; that is, direct mail without government assistance. This reading of the Convention violates the absurdity doctrine.

Use of customary international law as an aid to treaty interpretation has been abolished by the constitutional analysis contained in the *Erie* doctrine. However, even if *Erie* were not taken into consideration, use of customary international law as an aid to interpret unambiguous treaty text violates the Constitution's assignment of the power to say what the law is to the judiciary by having the judiciary defer to the international community's view of what our law is or what our law-makers adopted. Overlooking these constitutional problems to the use of customary international law as an aid to interpretation, customary international law itself, as codified by the Vienna Convention, supports the majority opinion's conclusion because it too places paramount emphasis on treaty text.

Finally, the executive's views regarding unambiguous treaty text should not be deferred to by the Supreme Court because, under the Constitution, the power to interpret the words of a statute or treaty is assigned exclusively to the judiciary, not the executive. The circumstances presented in this case do not warrant the Court's deferring more to the executive than to its own reasoning processes regarding the interpretation question at issue because the case turns on treaty text and not some *Chevron*-style technical area that the executive is better positioned to analyze.

ARGUMENT

I. The split in the lower courts is a disagreement over (1) what treaty interpretation methodology the Supreme Court should apply to unambiguous treaty text in any treaty, and (2) the proper interpretation of Article 10 of the Hague Service Convention regarding service of process by direct mail without government assistance.

The United States and 70 other nations have ratified the Hague Service Convention,[1] which employs the words "send" in Article 10(a) and "effect serve" in Article 10(b). These words have given rise to a split of authority across the United States as to whether the Convention allows a plaintiff to serve process upon a foreign defendant located in another country by merely placing the summons in the mail without the assistance of any governmental channel.[2] The Fourteenth Court of Appeals from Texas was also split regarding these words, with the majority concluding that service of process by direct mail is *not* allowed under the Convention, J.A. 55, 58, and Justice Christopher in dissent

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[1] The formal name of the Hague Service Convention is "Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters." 20 U.S.T. 361, 658 U.N.T.S. 169. J.A. 5-17.

[2] *Compare Ackermann v. Levine*, 788 F.2d 830, 838-839 (2d Cir. 1986); *Koehler v. Dodwell*, 152 F.3d 304, 307-308 (4th Cir. 1998); and *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), *with Nuovo Pignone SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); and *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989).

concluding that it *is*. J.A. 60. The disagreement among the courts to have considered the issue is fundamentally a disagreement over the proper interpretive methodology, with one side applying a textual-centric approach and the other side applying an extra-textual-centric approach. In this regard, Justice Christopher states in her dissenting opinion that "the majority fails to follow the United States Supreme Court's directions on the construction of treaties." J.A. 60.

Water Splash contends (consistent with the service-by-direct-mail cases and Justice Christopher's dissent) that this Court should look beyond the text of the Convention to conclude that the 71 signatory nations to the Convention intended for the word "send" to be synonymous with "effect service." This extra-textual methodology, according to Water Splash, results in the interpretative conclusion that a plaintiff in a forum country (say, Sri Lanka, Ukraine, or Malawi) may serve a lawsuit upon a defendant in another country (say, the United States, Mexico, or Canada) by direct mail without any governmental involvement. That is, a plaintiff or a plaintiff's lawyer may effectuate service by placing a summons in the mail. In making this point, Water Splash argues that resort to extra-textual sources is warranted because "the Convention's specific *scope* and *purpose* are limited to the regulation of transmittals for effectuating service abroad" it is necessary to look beyond the language of the Convention to ascertain what other international sources say the word "send" was intended to communicate. Pet. Br. 24 (emphasis added).

Menon on the other hand (consistent with the no-service-by-direct-mail cases and the majority opinion below) contends that the Court should not look beyond the text of the Convention because the text is not ambiguous and to do so violates the Constitution. This text-first methodology results in the interpretative conclusion that a plaintiff in the forum country may not effectuate service by direct mail without government involvement. That is, a plaintiff or a plaintiff's lawyer may not effectuate service by placing a summons in the mail.

Thus, the preliminary question in this case is one of interpretive methodology; that is, to what extent may resort be had to extra-textual materials, if any, when the text of a treaty is unambiguous? This Court has not squarely answered this important question.

II. The Constitution's division of powers between the executive, legislative, and judicial branches requires that the text-centric methodology be applied by the judiciary when interpreting unambiguous treaty text.

Although treaties are similar to contracts in that they are written agreements between two or more nations,[3] treaties are most definitely distinct from contracts because a nation party to a treaty is subject to,

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[3] *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract, though

not only the language of the treaty, but also to its municipal laws[4] that affect the application and enforceability of the treaty within that nation's political system. This important aspect of treaty law has been repeatedly confronted by this Court because a treaty is subject to the strictures of our Constitution.[5]

Thus, the structural aspects of our Constitution as they relate to treaty formation are the crucial starting point in the analysis of which methodology should be applied when generally interpreting and construing a treaty and specifically to the interpretation and construction of the Hague Service Convention in this case.

The United States Constitution distributes the authority of dealing with foreign nations among the three branches of government and establishes that ratified treaties are a source of binding law for our Nation. In this regard, the Supremacy Clause states that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme law of the Land; and Judges in every State shall be bound thereby." U.S. CONST. art. VI, cl. 2. This Clause means

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between nations."); *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014).

[4] The term "municipal law" is used herein to denote the internal laws of a national legal system, such as the municipal laws of Canada or the municipal laws of the United States.

[5] *See, e.g., Medellin v. Texas*, 552 U.S. 491, 520 (2008) (A treaty is only obligatory on the United States "so long as the [treaty] agreement is consistent with the Constitution."); *Reid v. Covert*, 354 U.S. 1, 16 (1957) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

that a fully implemented treaty is equivalent to an act of the legislature. *Medellin*, 552 U.S. at 538 (Breyer, J., concurring, joined by Souter and Ginsburg, JJ.). The Treaty Clause states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[.]" U.S. CONST. art. II, § 2, cl. 2. This Clause means that the President has the sole power to negotiate a treaty and that the Senate may ratify a treaty but only after it has first been negotiated by the President. *Zivotofsky v. Zivotofsky*, 135 S. Ct. 2076, 2086 (2015).

Congress too has an important role in treaty formation.[6] The Commerce Clause authorizes Congress "to regulate commerce with foreign nations[.]" U.S. CONST. art. I, § 8, cl. 3. And, Congress participates directly with a treaty becoming federal law by passing "implementing" legislation when the treaty is not made self-implementing by the language of the treaty itself, *Medellin*, 552 U.S. at 505; by passing legislation under the Necessary and Proper Clause needed to carry out the aims of the treaty, U.S. CONST. art. I, § 8, cl. 18; and by passing legislation that, for example, requires direct application of International Court of

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[6] *Zivotofsky*, 135 S. Ct. at 2090 ("In the world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not the President alone to determine the whole content of the Nation's foreign policy.").

Justice (ICJ) rulings or application of customary international law to treaties to which the United States is party, or that alters or completely preempts the subject matter of a treaty.[7]

This structural arrangement establishes that, "[i]n foreign affairs, as in the domestic realm, the Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" *Zivotofsky*, 135 S. Ct. at 2087 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Thus, the structural arrangement of our Nation's government is of immense significance in determining the proper methodology to be employed when interpreting any treaty, and the Hague Service Convention in particular. The Constitution places the law-making function in the case of treaty formation on the President as negotiator of a treaty and on the legislature as adopting the treaty, which the interpretive methodology applied by the judiciary should not alter.

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[7] *See, e.g., Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014) (Before the Foreign Sovereign Immunities Act (FSIA) preempted the field, which was traditionally a matter of "grace and comity on the part of the United States, and not a restriction imposed by the Constitution," this Court deferred to decisions of the political branch about whether and when to exercise judicial power over foreign states. Now the text of the FSIA prevails.); *Medellin*, 552 U.S. at 530 (ICJ judgment not binding in United States courts because treaty providing for ICJ jurisdiction not implemented by Congress); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721, 724 (2004) (Congress passed the Alien Tort Statute thereby allowing for a narrow aspect of customary international law to be the substantive basis for certain claims brought by foreigners in federal courts).

A related point about treaty interpretation bearing on our constitutional structure is that of whose intent is being interpreted. The cases occasionally state that the focus is on the intent of the drafters of a treaty. However, from the perspective of our Constitution, the focus is most properly on the intent of those persons empowered to consent to and ratify the treaty on behalf of the American people; namely, the President, Senators, and Congresspersons. The drafters' role in the treaty-making process is obviously important to the creation of the text, but the intent of the political figures that actually negotiate and consent to the terms and text of a treaty is most relevant as far as questions of interpretation and construction are concerned. Moreover, the political figures, under our Constitution, have the power to adopt substantive laws for our nations; the drafters do not. And because the political figures are not involved in the drafting of a treaty, they perforce focus on the text of a treaty and their perception of the meaning of the text.

This point is of great relevance to whether the text-centric approach to treaty interpretation is more in line with our constitutional structure than the extra-textual approach with respect to unambiguous terms of a treaty. For example, if our political figures read unambiguous text of a proposed treaty, it is unreasonable to impute upon them an intent to communicate a meaning *different* from what a normal reading of the text would indicate solely because extra-textual materials created before or after the treaty is adopted seem to indicate that some of the drafters intended to

communicate something else. Such an arrangement elevates the role of the drafters to law-making status, thereby diluting the authority of the political figures that our Constitution has designated as the proper law-making authorities. It also transfers to the judicial branch the power to make law differently from the law expressed in the unambiguous text adopted by the legislative branch.

To insure that the law-making function is maintained where the Constitution placed it – on the political figures – this Court should apply the text-centric methodology when interpreting unambiguous treaty text. That is, when the text of a treaty presents a clear meaning, the inquiry should stop without resort to extra-textual materials as an aid to interpretation. This objective approach focuses on the actual text of a treaty and emphasizes analysis of the words used; words which we know as a matter of fact were intended by the political figures to guide our affairs and to be applied by the Courts. Application of the extra-textual methodology when interpreting unambiguous treaty text looks to the subjective intentions of the parties that drafted and adopted the treaty. Attempting to determine the subjective intentions of a group of people is difficult or impossible, whereas unambiguous text is a clear guide of intent. Similarly, focus on the "object" or "purpose" of a treaty shifts the law-making function from the political branch to the judicial branch by allowing the judiciary to define the object and purpose of the treaty. But again, unambiguous treaty text, being objective evidence of what was intended to be

communicated, respects the law-making intentions of the authorities assigned the law-making function and avoids the risk of this power being improperly taken by the judicial branch in violation of the Constitution.

III. The judicial branch should not apply customary international law as an aid to interpret unambiguous treaty text unless the legislative branch has authorized the judicial branch to do so. Such use transfers the law-making function from the legislative branch to the judicial branch in violation of the Constitution.

The extra-textual methodology applied to interpretation of unambiguous treaty text defers to the practices and understandings of the international community, as reflected in a wide array of international sources, such as scholarly writings and judicial opinions produced through the workings of other nations' municipal laws. In this regard, Water Splash would have this Court look beyond the unambiguous text of the Hague Service Convention to ascertain what it claims are the relevant international communities' understandings of what the drafters intended by the text of the Hague Service Convention. This is an invitation to apply customary international law as a tool for interpreting the unambiguous text of a treaty. This line of thinking disregards our Constitution's mandate regarding the proper source of international law for the United States. This line of thinking also disregards the fundamental idea that law is a command of a

sovereign, and therefore, its origin and authority is located in a specific and identifiable source. Again, the President negotiates the terms of a treaty, the Senate gives advice to the President in his negotiations and consents (or not) after the negotiations are complete, and Congress in regulating commerce, implements a treaty if necessary, and legislates to carry out, fund, alter, or preempt the treaty.[8] This sharing of power is the sole mechanism for treaty formation in the United States, and it is of constitutional magnitude, meaning that any other purported source of "international" law is illicit.[9] The only federal law is the federal law adopted by our legislature; in short, the international

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[8] *Medellin*, 552 U.S. at 505 ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.' ") (ellipsis in original); *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshal, C.J.) ("In the United States . . . [o]ur constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

[9] See *Medellin*, 552 U.S. at 515 ("Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution – vesting that decision in the political branches, subject to checks and balances. U.S. Const., Art. I, § 7. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. Art. II, § 2.").

community has no authority under our Constitution to impose its customary practices as law upon our legal system without our legislative consent. This conclusion is further bolstered by the fact that the Constitution gives Congress the power "[t]o define and punish . . . Offenses against the Law of Nations," U.S. CONST. art. II, § 8, which of course indicates that Congress must incorporate customary international law by statute before it can be recognized or applied by the judiciary.

Customary international law is defined as the law of nations as "established by the general consent of mankind," *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227 (1796), as "founded on the common consent as well as the common sense of the world," *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863), and which is "generally accepted" by the "common consent of mankind," *The Scotia*, 81 U.S. (14 Wall.) 170, 187-188 (1871). "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(2) (1986). It, by definition, evolves over time as did the general common law applied by American courts in the Eighteenth Century. *See Swift v. Tyson*, 41 U.S. 1 (1842), overruled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

It goes without saying that international law is of grave significance to our Nation, and because of this, "United States courts apply international law as part of our own in appropriate circumstances[.]" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423

(1963) (refusing to apply customary international law as part of our own under the circumstances), *rev'd by* 22 U.S.C. § 2370(c); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) ("international law is part of our law"). That is not to say however that we therefore should look to the international community's views at large as a source for international law as if it were our federal law absent its being adopted as law through our constitutionally mandated procedures, or that we should use those views as a means of interpreting unambiguous treaty text without the legislature telling us to do so. *United States v. Alvarez-Machain*, 504 U.S. 655, 667-668 (1992) (refusing the suggestion that customary international law should be used to aid in the interpretation of the extradition treaty at issue).

"International law" only becomes our law when it has been made law through the law-making steps contained in the Constitution. Likewise, the international community's general views regarding international law are only a proper source of law under our Constitution when those general views have been adopted through the law-making mechanisms of our Constitution. For example, a *treaty* adopted under our Constitution by the law-making authority is federal law; treaty text is a proper source of federal law if enacted by the law-making authority according to the requirements of our Constitution. A second example is *legislation* authorizing the use of customary international law or the use of a judgment from the ICJ in American judicial proceedings; the customary international law or ICJ judgment would be proper sources of federal law if enacted

by the law-making authority according the Constitution. In these examples, the treaty, customary international law, or ICJ judgments are made a part of United States law, and therefore, can and should be applied in and by American courts without offending the Constitution because the "international law" in those circumstances has been specifically made part of our law by the law-making authorities in conformity with the Constitution.

The distinction of international law as a proper or improper source of federal law comes clearly to the forefront when a party attempts to directly apply customary international law in a United States Court or, as in this case, when a party attempts to use customary international law as a tool of treaty interpretation, thereby elevating the extra-textual international materials above the unambiguous text of a treaty adopted by the President, the Senate, and Congress. The theory behind the argument that customary international law should be used as a tool for interpreting unambiguous treaty text is that the general understandings of the international community are entitled to prevail over the United States' authority to pronounce its own laws because United States courts have an obligation to respect the views of foreign nations. United States courts, however, have only one obligation, which is to apply the laws enacted by the constitutionally mandated law-making authority. The use of customary international law as a device of treaty interpretation in the face of unambiguous treaty language, *without* legislation allowing for such use, violates the precepts of the

Constitution because customary international law is *not* law of the United States, *unless* it has been properly adopted as federal law pursuant to the Constitution.

The concept of "general law" is anathema to our Constitution's assignment of the law-making function to the legislative branch. Under the now-defunct *Swift* doctrine, federal courts exercising diversity jurisdiction were required to apply "general federal common law" instead of the common law as articulated by the state courts, thereby emasculating state sovereignty on questions of state law. The philosophical underpinnings of the *Swift* doctrine were that the general law is not strictly local in nature, that state court decisions do not constitute laws per se but are only some evidence of what the law actually is, and therefore, that the law is not *made* by any sovereign authority but is *found* through analysis of general principles and doctrines. The *Swift* doctrine violates the constitutional authority of states and rests on the outmoded theory of preexistent law, implies that judges reach their decisions through a deductive process, rejects the idea that judicial decisions "make law," and denies that law is based on the authority of a sovereign. The general law was thus viewed much like a natural law-like Platonic Form,[10] a mysterious "brooding omnipresence in

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[10] For a description of Platonic Forms theory, see Bertrand Russell, THE HISTORY OF WESTERN PHILOSOPHY 121-122 (Simon & Schuster 1972) (1945).

the sky,"[11] that reigned supreme to all man-made laws. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in judgment, joined by Rehnquist, C.J., and Thomas, J.).

The general-law principle of the *Swift* doctrine allowed the federal courts to unify the varied state laws into one system at the expense of state sovereignty and at the expense of the Constitution. The constitutional infirmities inherent in the metaphysics of the *Swift* doctrine came tumbling down with the landmark *Erie* holding that is nicely summarized in the oft-quoted statement that "there is no general federal common law[.]" *Erie Railroad Co.*, 304 U.S. at 78; *see also Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("There is no common law of the United States in the sense of a national customary law[.]"). *Erie* cemented once and for all the view that law is made by an identifiable and known sovereign authority, which in the case of America, is spelled out in the Constitution.[12] It is worth noting that

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[11] *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified[.]").

[12] *Sosa*, 542 U.S. at 730 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction that federal courts have no authority to derive 'general' common law.") (citation to *Erie* omitted).

Erie did not excise natural law[13] thinking from our constitutional system; rather, it removed it from the judiciary's role of interpreting and applying the laws.[14] The legislature is free to use whatever reasoning it likes (within the limits of the Constitution) in deciding what legislation to enact as the law of the United States. That includes enacting laws that it considers to be consistent with natural law or customary international law. The judiciary, however, cannot use that sort of reasoning as a basis for interpreting or applying the laws without disturbing the balance of power set by the Constitution.

The *Swift-Erie* story is directly relevant to the question of whether customary international law can be applied to interpret the unambiguous text of a treaty without violating the Constitution's assignment of the law-making function to the legislative branch. *Sosa*, 542 U.S. at 725-726.[15] Customary international

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[13] Natural law has an important place in American legal history. *See, e.g.*, THE DECLARATION OF INDEPENDENCE, preamble (U.S. 1776) (invoking the Laws of Nature); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); see also Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW 1335-1341 (3d ed. 2000).

[14] Although natural law theory is not an exact science (that puts it mildly), it is fairly uniformly agreed that positive law as made by human institutions is the concrete and enforceable law, whereas natural law is the unseen force that animates the lawmaker's desire to adopt good positive law. See John Finnis, NATURAL LAW & NATURAL RIGHTS 26-29 (2d ed. 2011). It follows, then, that law-makers (not judges) are the ones posed to divine natural law so as to be inserted in the positive law they adopt.

[15] See also Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Curtis A.

law is, by definition, general law in the metaphysical sense contemplated by the *Swift* doctrine and struck down by *Erie*. Because of this, a court must identify the sovereign source for each rule of law. Under our Constitution, the sovereign authorities that make law are the federal government and the states. Thus, any law applied by federal or state courts must be federal or state law adopted under the constitutions of those governments. These are the only proper sources of law. Law as general in the *Swift* sense is no longer the philosophical underpinning of law as a source of authority in the United States constitutional system. Our current understanding of law as a source of authority is that it emanates solely and exclusively from the Constitution, which places the law-making function in the legislature, not in the judiciary to be found from the common understandings at large. Thus, customary international law cannot properly be used as authority for interpreting unambiguous treaty text because to do so undermines the proper authority of the sovereign United States of America; that authority is the President, the Senate, and Congress. If the text adopted by our law-making authority is unambiguous, it encroaches upon the authority's power to deviate from the meaning of the text by resort to extra-textual

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Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-853 (1997) ("After *Erie*, a federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the general common law.").

sources, especially when those sources were created after the treaty was adopted. Justice Scalia summed up the problem as follows:

> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

Sosa, 542 U.S. at 750 (Scalia, J., concurring in part and concurring in judgment, joined by Rehnquist, C.J., and Thomas, J.). Application of the extra-textual methodology to unambiguous treaty text so as to allow for the use of customary international law does exactly what Justice Scalia warned of.

It is axiomatic that our courts should respect the opinions and views of other nations. *Abbott v. Abbott*, 560 U.S. 1, 16 (2010); *Sanchez-Llamas (Moises) v. Oregon*, 548 U.S. 331, 355 (2006); *Breard v. Green*, 523 U.S. 371, 375 (1998) (per curiam). But those opinions are most definitely no more authoritative than the logic of a scholarly article, an advocate's brief, or a thoughtful citizen's letter to his or her President, Senator, or Congressperson. It is the strength of the logic that is authoritative (not the speaker from whence the message

comes) when the "source" being considered is not actually federal law. The only proper law is the law adopted pursuant to Constitutional law-making steps, which, in this case, are the words of the Convention adopted by the President, Senate, and Congress. For a court to use customary international law to interpret unambiguous treaty text improperly alters the balance of power established by the Constitution. When the unambiguous text of a treaty provides an answer, the law-making authority's intent has been isolated, the law has been interpreted, and the judiciary's inquiry should go no further. Such a method best insures the separation of the powers of our government as required by the Constitution.

There are of course circumstances where foreign opinions and laws are properly considered in American judicial proceedings. For example, a court does not offend our Constitution in applying the substantive law of another country where a treaty or American statute *requires* the use of the substantive law of another country. This is exemplified by *Abbott v. Abbott*, where child access and custody rights were established by Chilean law and those rights required this Court to determine the significance of the term "*ne exeat*" under the Hague Convention on the Civil Aspects of International Child Abduction, 19 I.L.M. 1501, and the implementing statute, the International Child Abduction Remedies Act, 42 U.S.C. § 11601-11610. 560 U.S. at 16-22. In that case, the treaty, which was properly made part of the federal law by our law-making authorities, required the courts to focus on the substantive rights that had been created in a foreign country; namely, the

custody rights of the parent as stated in a previous Chilean order pursuant to Chilean municipal law. Another example was *Sosa v. Alvarez-Machain*, where this Court concluded that Congress had long ago passed the Alien Tort Statute with the intent of specifically authorizing a narrow category of claims based on then-existing customary international law. But absent a specifically relevant reason authorized by our lawmaking authorities to rely on a foreign nation's views on a legal question, the general statement that foreign nations' views deserve respect is misleading insofar as the statement means that those views are more deserving of respect than other thoughtful views. At the very least, foreign nations' views should not supplant the views of this Court on questions of constitutional significance just because those questions arise in the context of a treaty.[16] Rather, this Court makes that determination based on its own assessment of the Constitution's requirements of how the law of the United States comes about. After all, it is this Court's role, not the international community's, to state what the federal law is. THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the [l]egislative body.").

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[16] *Medellin*, 552 U.S. at 522-523 ("[W]hile the ICJ's judgment in [*Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12] creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on filing of successive habeas petitions.").

Thus, where the words of a treaty are not ambiguous, it violates the structure of our Constitution to look to international sources beyond the text (especially where the sources were created after the treaty was adopted by our political figures) unless the text leads to an absurd result.[17]

IV. The judiciary should not defer to the executive's view regarding unambiguous treaty text because to do so violates the judiciary's constitutional duty to say what the law is.

The executive's views are often cited by litigants as especially authoritative in matters of treaty interpretation; and, this Court has said that those views are "entitled to great weight." *Lozano*, 134 S. Ct. at 1238 (Alito, J., concurring, joined by Breyer, and Sotomayor, JJ.); *Abbott*, 560 U.S. at 15; *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982). This Court however has never, at least in modern times, deferred to the executive's views when interpreting the terms of an unambiguous treaty. Moreover, the executive's views do not warrant special weight just because

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[17] See *Medellin*, 552 U.S. at 554, 557 (Breyer, J., dissenting, joined by Souter, and Ginsburg, JJ.) (Assuming the conclusion that treaty language is unambiguous, the conclusion that the ICJ's judgment is not binding in U.S. court leads to an absurd result: "What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.*, that Congress must enact specific legislation to enforce it)?").

a treaty is involved, but rather only when there is something special about the executive's involvement in the subject that gives the executive special insight that cannot be duplicated at the judicial level. *See Abbott*, 560 U.S. at 40-43 (Stevens, J., dissenting, joined by Thomas, and Breyer, JJ.).

An apt analogy is *Chevron* deference given to administrative agencies regarding specialized subject matter that an agency deals with on a routine basis, thereby putting that agency in a superior position to understand the intricacies of the circumstances.[18]

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[18] *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865-866 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principles of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." "Judges are not experts in [pollution-emitting devices], and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with administration of the statute in light of the everyday realities.").

However, even the bastion of *Chevron* deference is subject to the serious criticism that it "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). If that criticism were to someday topple the *Chevron* deference doctrine, there would remain no constitutionally valid basis for the judiciary's deferring to the executive's views on matters of legal interpretation.

In the case of a treaty where the text is clear, the executive is in no more of a superior position to interpret the words than any other thoughtful person. In fact, the Supreme Court is in a *better* position than the executive to interpret unambiguous treaty text, and therefore, the Supreme Court should give no deference to the executive's views; at least, that is, it should give no more deference to the executive's view than it gives to any other litigant's views insofar as the views are based in logic and thoughtful analysis. The deference is not to the speaker, but to the merit of what the speaker is saying.

The suggestion that the executive is in a better position to interpret unambiguous treaty text disregards the basic separation of powers of our government. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshal, C.J.). And, "[t]he construction of treaties is the peculiar

province of the judiciary[,]" not the executive. *Jones v. Mecham*, 175 U.S. 1, 32 (1899).

In short, the views of the executive under the circumstances of unambiguous treaty text are no more persuasive than are the views of an advocate for one of the parties and deference by the judicial branch to the executive branch under these circumstances upsets the basic balance of powers set up by the Constitution.

V. There is no ambiguity presented by the text of the Hague Service Convention regarding whether the intent was to allow service of process by direct mail without government assistance.

The Hague Service Convention applies to this case because Menon was served in Québec, Canada, where she is a citizen and resident. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) ("By virtue of the Supremacy Clause, U.S. CONST., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies."). Again, Water Splash argues that the Convention authorizes service by direct mail without governmental assistance, which is how Menon was served with process in the trial court.

The first step in addressing Water Splash's argument is to review the text of the Convention with an eye towards ascertaining whether the text is ambiguous regarding service of process by direct mail without governmental assistance. Article 10 of the Convention

is of particular relevance because it is the Article that Water Splash relies on for its service-by-mail claim; Article 10 states:

> Provided the State of destination does not object, the present Convention shall not interfere with
>
> (a) the freedom to ***send*** judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to ***effect service*** of judicial documents directly through the judicial officers, officials or other competent persons of the State of designation,
>
> (c) the freedom of any person interested in a judicial proceeding to ***effect service*** of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination.

J.A. 8-9 (emphasis added). The words "send" and "effect service" are the crux of the controversy because, had the words "serve" or "effect service" been substituted for the word "send" in Article 10(a), the meaning advocated by Water Splash would be plausible. Because that did not happen, Water Splash is in the position of arguing that use of the word "send" in Article 10(a) was a mistake or sloppy draftsmanship. Pet. Br. 30.

Generally words of a statute or treaty are to be understood in their ordinary and everyday meaning. *See*

Helvering v. Hutchings, 312 U.S. 393, 396 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 71 (1824). In line with this common-sense axiom, it is reasonable to conclude that when the text of a statute or treaty uses a particular word or phrase more than once, the intent is to communicate the same idea throughout; and conversely, when the text uses a word or phrase one or more times, and then uses a different word or phrase, the intent is to communicate a different idea. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

Reading the words of Article 10 in their ordinary and everyday meaning with the idea that an alteration of the written words was for a specific purpose, Water Splash's argument that use of the word "send" in Article 10(a) was a mistake or sloppy drafting does not hold up because it is not absurd to include a provision on direct mail regarding service of post-answer judicial documents (such as motions or discovery) within a Convention that seeks to simplify the procedures by which judicial documents are served. In fact, it is quite logical to include in the same place provisions for service of both types of judicial documents; many would conclude that it would be illogical *not* to group such provisions within the same instrument as "birds of a feather" which are like in kind. Moreover, it would be natural to provide by treaty for both types of service because of the need, in both situations, for one nation's

legal process to encroach upon the territorial jurisdiction of another, but only by consent to do so. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute."). In this regard, the Fifth Circuit, in addressing Article 10's variations between the words "send" and "effect service," reasoned as follows:

> "Absent a clearly expressed legislative intention to the contrary," a statute's language "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And because the drafters purposely elected to use forms of the word "service" throughout the Hague Convention, while confining use of the word "send" to article 10(a), we will not presume that the drafters intended to give the same meaning to "send" that they intended to give "serve."

Nuovo, 310 F.3d at 384 (footnote omitted).[19]

Because there is a logical reason for the text to deviate – namely, to provide for service of both type of judicial documents – and the text of Article 10 read in its ordinary manner leads to the conclusion that service of both type of judicial documents are contemplated, the Court should conclude that the text of

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[19] The majority opinion from the Fourteenth Court of Appeals cited this quote in reaching its opinions in favor of Menon. J.A. 55.

Article 10 is unambiguous and that the variation between "send" and "effect service" was not "an obvious drafting error." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). However, the inquiry does not stop there because of the related axiom of interpretation that provisions of a statute or treaty should not be read in isolation of the whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). With that in mind, Article 10 should be read in the context of the remaining text of the Convention.

The preamble is an obvious starting place. It states that the signatories' desire is

> to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, . . . [and] to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure[.]

J.A. 5. Reasoning from the preamble, Water Splash's entire brief rests on the conclusion it draws from the preamble; namely, that "the Convention's specific scope and purpose are limited to the regulation of transmittals for effectuating service abroad." Pet. Br. 24.

Contrary to Water Splash's claim, the preamble does not express a desire to cover only service of initiating litigation documents, i.e., service of process. Certainly the preamble expresses a desire to encompass initiating documents; that is a given. The desires expressed in the preamble, as its words say, are to ensure

that when documents are served abroad they are given to the addressee with sufficient time to deal with them, *and* that the procedures create efficient cooperation between the governmental channels of the receiving and requesting nations.[20] There is nothing about these dual purposes that contemplates complete removal of governmental involvement in the initiating service of process procedures, which is the consequence of direct mail. On the other hand, it makes complete sense, consistent with the text of Article 10 and the remainder of the Convention, that after nations assist their citizens in initiating the legal proceedings by service of process, the follow-up litigation documents proceed by mail without governmental assistance. In short, Water Splash's key argument, that the "literal language of Article 10(a)" conflicts with "the specific purpose of the treaty," is not accurate. Pet. Br. 17. The language of Article 10 does not conflict with the stated purpose of the Convention; it naturally flows with the purpose.

Water Splash also looks to the words contained in the first part of Article 10 – "[p]rovided the State of destination does not object" – in conjunction with Article 21, which allows for a nation to state its "opposition to the use of methods of transmission pursuant to articles 8 and 10[.]" J.A. 13; Pet. Br. 25. Water Splash reasons that given a State's right to object (Article 21) to

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[20] See *Schlunk*, 486 U.S. at 704 ("Thus, the first stated purpose of the Convention is 'to create' appropriate means for service abroad, and the second stated purpose is 'to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure.' ").

use of postal channels (Article 10(a)), it is clear that service by mail does not include non-service-of-process documents because a party could nevertheless send documents by mail with impunity, in spite of an objection by a signatory nation to use of mail, because the mails are open to all. Pet. Br. 25. The response to this argument is simple: the penalty for use of mail to serve any document when a use-of-mail objection has been lodged would be non-enforcement of documents sent by mail from the forum State. *See Schlunk*, 486 U.S. at 705 ("[W]e do not think that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention[.]"). Additionally, the "problem" would also apply to service-of-process documents.

Other than these arguments based on the text of the Convention, Water Splash relies exclusively on extra-textual sources. However, the remaining text of the Convention further supports the conclusion that Article 10(a) is not a mistake or sloppy drafting. Those remaining provisions are summarized in *Schlunk* as follows:

> The primary innovation of the Convention is that it requires each state to establish a central authority to receive request for service of documents from other countries. Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law.

> The central authority must then provide a certificate of service that conforms to a specified model. A state also may consent to methods of service within its boundaries other than a request to its central authority. The remaining provisions of the Convention . . . limit the circumstances in which a default judgment may be entered . . . and provide some means for relief from such a judgment.

486 U.S. at 698-699 (citations omitted).[21] These remaining provisions encompass the idea that the governments of the signatory states will be involved,

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[21] *Article 1* states that the "Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Article 2* requires each nation to designate a Central Authority "to receive requests for service[.]" *Article 3* requires that a "authority or judicial officer . . . forward to the Central Authority . . . the document to be served[.]" *Article 4* states that the Central Authority shall inform an applicant if the document sought to be served "does not comply with the provisions" of the Convention. *Article 5* states that the Central Authority "shall itself serve the document or shall arrange to have it served by an appropriate agency . . . (a) by a method prescribed by its internal law . . . upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." *Article 6* requires the Central Authority to provide a certificate stating that service was made or not. *Article 7* provides the form and languages to be used by the Central Authority. *Articles 8 and 9* provide that traditional service of process through diplomatic channels is still available in lieu of the Convention's procedures. *Article 11* states that the nations are allowed to agree to other "channels of transmission[.]" *Article 12* provides for payment of fees. *Article 13* provides for the nations' preservation of their "sovereignty or security[.]" *Article 14* provides for resolution of "[d]ifficulties which may arise in connection with transmission of judicial documents for service . . .

whereas the interpretation advocated by Water Splash results in the signatory nations *not* being involved.

Water Splash does not take the position that Article 10, in the context of the whole text of the Convention, is ambiguous; rather, it takes the position that treaties are special because they are agreements between nations, and therefore, when a court is called upon to interpret and apply a treaty, ambiguous or not, it must *always* resort to extra-textual materials.[22] This is simply not correct. For the reasons already discussed, a court should first determine if treaty text is ambiguous; if it is not, the interpretive inquiry is over, unless the unambiguous text leads to an absurd result. Even the *amicus curiae* brief filed by the United States says on page 10 that "[i]f the text and context of the treaty are ambiguous, the Court 'may look beyond the written words' [of the treaty.]" This seems to agree with a principle point in this brief; namely, that the Court should not look beyond the written words of a treaty if those words are unambiguous.

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through diplomatic channels[.]" *Articles 15 and 16* provide restrictions on taking default judgments and provisions for setting aside default judgments. *Article 17* states that service may be accomplished among the signatories in accordance with the Convention. *Articles 18 thru 31* spell out general clauses.

[22] Pet. Br. 16 ("[T]he dissent noted that because treaties are contracts between sovereign States, their interpretation is governed by different principles than questions of pure statutory construction, including principles that examine non-textual sources of meaning[.]"); and Pet. Br. 18-39 (Throughout the Argument, Water Splash assumes that extra-textual materials should always be considered in treaty interpretation methodology.).

Water Splash, the *amicus curiae* brief filed by the United States, the dissenting opinion by Justice Christopher, and the opinions going the way of service-of-process-by-mail all rely heavily on extra-textual materials for their conclusion precisely because the unambiguous text of the Convention does not support their conclusion – if the text supported the opposite conclusion, they would not need to resort to extra-textual materials. Also, the preliminary procedural premise underlying their conclusions is that given the special nature of a treaty, the courts are required to resort to extra-textual materials, *even if the treaty text is unambiguous*. Thus, this Court is squarely presented with the question of whether it can or should go beyond the unambiguous text of a treaty when called upon to interpret a treaty.

The idea that unambiguous treaty text should stop the inquiry absent an absurd result is not new to the Supreme Court. For example, in *Chan v. Korean Air Lines, Ltd.*, the Supreme Court said:

> These estimations of what the drafters might have had in mind are of course speculation, but they suffice to establish that the result the text produces is not necessarily absurd, and hence cannot be dismissed as an obvious drafting error. We must thus be governed by the text – solemnly adopted by the governments of many separate nations – whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention.

> The later may of course be consulted to elucidate a text that is ambiguous, *see, e.g.*, *Air France v. Saks*, 470 U.S. 392 (1985). But where the text is clear, as it is here, we have no power to insert an amendment.

490 U.S. 122, 134 (1989). And, in *Factor v. Laubenheimer*, the Supreme Court said:

> Until a treaty has been denounced, it is the duty of both the government and the courts to sanction performance of the obligations reciprocal to the rights which the treaty declares and the government asserts even though the other party to it holds a different view of its meaning.

290 U.S. 276, 298 (1933). The procedural rule that the judicial inquiry regarding interpretation of a treaty ends with unambiguous text is not only of constitutional magnitude for the reasons stated in the first part of this brief, it also makes good common-sense. This is because of the unwieldiness of requiring the reader (which includes the President, Senate, Congress, and the Courts) to not only look to the text, but also to the corpus juris of the entire world (i.e., customary international law) to decipher meaning, even if doing so would lead to the opposite of what the unambiguous text communicates.

Water Splash cites to *Schlunk* for the suggestion that a ccurt interpreting a treaty can look beyond unambiguous treaty text. *Schlunk* does not support that proposition. In that case, the plaintiff served "process

upon a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service of process." 486 U.S. at 696. The Supreme Court was called upon to determine whether the forum State may decide whether the Convention applies. The Court interpreted the Convention such that "the internal law of the forum is presumed to determine whether there is occasion for service abroad." *Id.* at 704.[23] There was an ambiguity as to whether the forum State or the receiving State decides if the Convention applies, and therefore, the Court resorted to extra-textual materials to answer the question. Thus, *Schlunk* does not support the conclusion that a court should resort to extra-textual materials when interpreting unambiguous treaty text. If fact, during the oral argument of *Schlunk*, the question was specifically asked of petitioner's counsel whether the Court could look beyond the unambiguous text. No clear answer was received. Although this question was on the minds of the Justices, it needed not be answered because of the ambiguity presented in that case. The Court now has the question squarely before it. If it concludes that the text of Article 10 is unambiguous, the

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[23] See also *id.* at 708 (Brennan, J., concurring, joined by Marshall and Blackmun, J.J.) ("[T]he Court holds, and I agree, that a litigant may, consistent with the Convention, serve process on a foreign corporation by serving its wholly owned domestic subsidiary, because such process is not 'service abroad' within the meaning of Article 1. The Court reaches that conclusion, however, by depriving the Convention of any mandatory effect, for in the Court's view the 'forum's internal law' defines conclusively whether a particular process is 'service abroad,' which is covered by the Convention, or domestic service, which is not.").

Court should not look to extra-textual materials to aid in its interpretive duties for the reasons stated in this brief.

Entertaining Water Splash's request (and the United States' request contained in its *amicus curiae* brief) to go outside the text of the Convention, much of the emphasis is on other nations' views of how the text should be interpreted. This, of course, is to resort to customary international law, which has been discredited by *Erie*, as discussed above. A part of this aspect of Water Splash's claim is that many nations have not objected (under Article 21) to mail as allowed by Article 10. However, this line of argument assumes that the nations that have lodged statements of non-opposition or opposition understood the treaty in the same way that Water Splash urges this Court to accept. The fact of non-opposition or opposition by a nation in no way shows that that nation interpreted the Convention in the manner that Water Splash does; it is just as likely that those nations interpreted the Convention in the way that Menon does. In fact, given the unambiguous text, it is more likely that they interpreted the Convention the way that Menon does. A statement of non-opposition or opposition would be to mailing *any* judicial documents by the litigants directly or by the governmental channels set up pursuant to the Convention.

As for the opinions of courts from other nations is concerned, that, again, is a resort to customary international law as a guide to interpretation of the Convention. If we are going to resort to customary international law as a guide, then we are perforce

obligated to also resort to the Vienna Convention, VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331, because, even though the United States has not ratified the Vienna Convention, it is a codification of the rules of customary international law applicable to interpretation of all treaties.[24] Article 31 of the Vienna Convention states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* at art. 31(1). That is, text is dominant with the clear inference that text should not be altered by extra-textual sources.

"Context" is defined, among other things, as "the text, including its preamble and annexes." *Id.* at art. 31(2). Context also includes "[a]ny agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the of the treaty" and "[a]ny instrument which was made by one or more

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[24] *See* RICHARD K. GARDINER, TREATY INTERPRETATION 7 (2008) ("The International Court of Justice . . . has pronounced that the Vienna rules are in principle applicable to the interpretation of all treaties."); 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, intro. Note, at 144-145 (1987) (discussing the Vienna Convention's codification of the customary international law governing international agreements and the acceptance of the Convention in the United States); 2 UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 218-219 (1966) (The Vienna Convention was an attempt to "codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties."); *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 37 (Mar. 31); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 43 (July 9).

parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." *Id.* Supplementary means of interpretation are also permitted for limited purposes. Article 32 provides that:

> Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning . . . or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

Id. at art. 32. Again, text is dominant and its clear meaning should not be altered by resort to extra-textual materials. In other words, the textual focus of the Vienna Convention (that is, customary international law) is paramount, allowing for supplementary means of interpretation only after the text of a treaty demonstrates an ambiguity or an absurd result. In others words, the majority opinion in the Texas court of appeals applied the proper rules of treaty interpretation even through the lens of customary international law. *See Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3) ("[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.").

It is interesting to see that the brief filed by Water Splash and the *amicus curiae* brief filed by the United States cite to international authorities for their conclusions, not for their analysis. As discussed in this brief above, the point of considering other viewpoints (*e.g.*, the views of other nations' courts, scholars, the executive branch, the brief of a litigant) is not for the conclusions of those viewpoints, but for the reasoning behind the conclusions. If for example a person's conclusion is based on the reasoning that "a crow flew south at high noon," then that person's viewpoint (i.e., conclusion) is of no value. Assembling the conclusions of various nonbinding sources as a basis for convincing this Court to decide one way or another is of little to no value because this Court's conclusion must be based on logical reasoning, not vote counting. Most of the authorities cited by the briefs of Water Splash and the United States are European. It is worth noting that the European starting point for interpretation of legal instruments is diametrically opposed to the Vienna Convention and American legal thinking as exemplified by a volume from a European legal treatise similar to the American Restatement of the Law; namely, Article 5:101 from Principles of European Contract Law, which states:

> A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

Ole Lando & Hugh Beale, THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW, Art. 5:101 (2000). It would be quite shocking for an American lawyer to advocate in an American court

that a contract or statute should be interpreted in a way that differs from the literal meaning of the words, but this is precisely the mind-set of the European community (at least according to one of its lead treatises) that might explain the European perspective on treaty interpretation, which happens to conflict with customary international law as codified in the Vienna Convention. The point is that the conclusions of the differing international views are not as relevant as are the reasoning of how those conclusions were arrived at. Based on what Water Splash has provided, only the conclusions are available.

Water Splash also claims that the French version of the Hague Service Convention supports its interpretation. However, even the Vienna Convention states that when a treaty is authenticated in two or more languages, the "terms of the treaty are presumed to have the same meaning in each authentic text." VIENNA CONVENTION ON THE LAW OF TREATIES, 1155 U.N.T.S. 331, Art. 33. The point that Water Splash attempts to make by discussing the French version versus the English version is that "service" means service of process and only service of process. The argument is unconvincing because all judicial documents must be "served." The pedantic distinction that service-of-process documents are "served" but other judicial documents exchanged throughout a lawsuit are not "served" flies in the face of common usage. That is, when a lawyer serves discovery or motions on the opposing lawyer, he or she "serves" those documents. No one practicing law would quibble with such an obvious statement or usage of the

word serve. But it would be strange indeed if one lawyer were to say to another lawyer, "I do not understand what you mean when you tell me you served me with discovery." This is important to Water Splash because it wants to establish that the drafters never considered "service" of non-service-of-process documents by "sending." In a world where lawyers and the public actually litigate disputes, however, it is certainly possible to serve non-service-of-process documents by various means.

VI. Policy concerns support the interpretation of the lower court's reading of Article 10(a).

Justice Brennan's concurring opinion in *Schlunk* expressed incredulity at the possibility that a nation focused on due process would allow service of process via postal channels. *Schlunk*, 486 U.S. at 707 (Brennan, J., concurring, joined by Marshall and Blackmun, JJ.). He wrote:

> Admittedly . . . the Convention's language does not prescribe a precise standard to distinguish between "domestic" service and "service abroad." But the Court's solution leaves contracting nations free to ignore its terms entirely, converting its command into exhortation. Under the Court's analysis, for example, a forum nation could prescribe direct mail service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service

> complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant.

Id. at 710-711. He uses the idea of direct mail as a possibility, not as actual valid interpretation of the Convention, but rather as a way to emphasize the improbability that a nation would actually authorize such service of process as a means of comporting with due process. The point from a policy perspective is that such service is not conducive to fairness, and it would encourage entry of judgments against foreign nationals not having knowledge of the underlying proceedings. Entry of judgments against foreign nationals without being given actual notice was one of the very concerns the Convention was designed to protect against.

The consequences of affirming the holding of the lower court are that American courts will not allow judgments to be entered against signatory nations' citizens when they have been served through mail with no government involvement. Foreign governments will surely appreciate this protection provided to their citizens. As for the argument that not being able to use the mails will increase the costs of litigation, the Convention specifically provides for the creation of a system that is designed to be cost efficient and fast. The argument that direct mail without using the governmental channels specifically set up to handle service requests is an affront to the system itself. The incongruity of the argument is patent: it claims that, on the

one hand, the system set up by the Convention provides an efficient and fast governmental channel through which process may be accomplished, but on the other hand, the system is cumbersome and costly, and therefore litigants can by-pass the system's involvement by direct mail service. That is, set up a system to avoid the system.

Additionally, there is the counter-argument that foreign nationals that obtain judgments against American citizens after service by mail will not be able to execute those judgments in American courts if the Supreme Court follows the lower court's holding. However, even if the Supreme Court does not follow the lower court's holding, American courts will nevertheless not allow for enforcement of default judgments based on mail if there is no actual notice. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). Thus there is no serious inconvenience to the foreign nations. Moreover, such judgments would be enforceable in nations that have interpreted the Convention to allow service of process by mail.

VII. The problem of Canadian constitutional law and Québec's not implementing the Convention.

Menon argued in the lower courts that the service by mail was not proper (1) under Article 138 of the Code of Civil Procedure of Québec because the service by mail was not obtained in the district of the place in which the written proceeding was served, CODE CIV. P.

QUÉBEC, art. 138; (2) Québec has no implementing legislation regarding the Hague Service Convention as required by the Canadian Constitution,[25] in which case, service must be by traditional diplomatic channels (*e.g.*, letters rogatory); and (3) the possible administrative implementation of the Hague Service Convention by Québec as indicated by the Hague Conference website shows that Water Splash, Inc. failed to comply with the Québec regulations regarding service of process.

These arguments were not reached by the Texas court of appeals, and therefore, if the Supreme Court disagrees with the majority opinion's holding, it should reverse for Menon's additional arguments to be considered.

CONCLUSION

For these reasons the judgment below should be affirmed, or alternatively, remanded to the Fourteenth

[25] CAN. CONST. (Constitution Act, 1867) ch. VI, §§ 91-95, *Canada Attorney-General for Canada v. Attorney General for Ontario*, [1937] 1 D.L.R. 673, *Capital Cities Communications, Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-173, 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 11.4(a) (5th ed. 2007) ("a treaty which requires a change in the internal law of Canada can only be implemented by the enactment of a statute which makes the required change in law").

Court of Appeals of Texas for consideration of the arguments that were not reached.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Writ of Certiorari to the
Fourteenth Court of Appeals, Houston, Texas

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT IN REPLY 1

I. The view that "send" means or includes "serve" follows from *stare decisis* and intrinsic evidence. 1

A. *Stare Decisis* 1

B. Intrinsic Evidence 3

II. Menon's view that "send" means "service of post-answer documents" is unreasonable. 11

A. The text of the Convention does not distinguish between service of process and service of post-answer documents. 12

B. Menon's view is also based on unsupported assumptions regarding the meaning of other Convention terms. 14

III. When interpreting an unclear treaty, extrinsic evidence should not be displaced by a canon of construction. 18

IV. If the court of appeals' decision is reversed, remand is procedurally appropriate. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Chabert v. *Bacquie*,
694 So. 2d 805 (Fla. Dist. Ct. App. 1997) 17

Chan v. *Korean Air Lines, Ltd.*,
490 U.S. 122 (1989) 19

Combs v. *Nick Garin Trucking*,
825 F.2d 437 (D.C. Cir. 1987) 4

Eastern Airlines, Inc. v. *Floyd*,
499 U.S. 530 (1991) 20

Factor v. *Laubenheimer*,
290 U.S. 276 (1933) 20

Hilton v. *S.C. Pub. Railways Com'n*,
502 U.S. 197 (1991) 3

Jones v. *Flowers*,
547 U.S. 220 (2006) 10

Katy Venture, Ltd. v. *Cremona Bistro Corp.*,
469 S.W.3d 160 (Tex. 2015)..... 4

Lugosch v. *Pyramid Co. of Onandaga*, 435
F.3d 110 (2d Cir. 2006)..... 15

Marx v. *Gen. Revenue Corp.*,
133 S. Ct. 1166 (2013) 3

Maximov v. *United States*,
373 U.S. 49 (1963) 19

Medellin v. *Dretke*,
544 U.S. 660 (2005) 3

Peralta v. *Heights Med. Ctr., Inc.*,
485 U.S. 80 (1988) 10

TABLE OF AUTHORITES – CONTINUED

Page(s)

Richlin Sec. Serv. Co. v. *Chertoff*,
553 U.S. 571 (2008) 10, 20

Russello v. *United States*,
464 U.S. 16 (1983) 10, 11, 20

Sumitomo Shoji America, Inc. v. *Avagliano*,
457 U.S. 176 (1982) 19

United States Postal Serv. v. *Council of Greenburgh Civic Associations*,
453 U.S. 114 (1981) 6

United States v. *Harriss*,
347 U.S. 612 (1954) 22

United States v. *Martin*,
395 F. Supp. 954 (S.D.N.Y. 1975) 4

United States v. *Percheman*,
7 Pet. 51, 89, 8 L.Ed. 604 (1833) 3

Utility Air Regulatory Group v. E.P.A.,
134 S. Ct. 2427 (2014) 13

Volkswagenwerk Aktiengesellschaft v. *Schlunk*, 486 U.S. 694 (1988) ..... *passim*

Treaties, Constitutions, and Rules

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (English),
20 U.S.T. 361 (1969) ..... *passim*

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (French), *available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17 16

TABLE OF AUTHORITES – CONTINUED

Page(s)

FED. R. CIV. P. 4 8

FED. R. CIV. P. 4.1 14

FED. R. CIV. P. 5 14

TEX. R. CIV. P. 21a 14

TEX. R. CIV. P. 103 8

TEX. R. CIV. P. 629 14

U.S. CONST., Art. VI 21

Vienna Convention on the Law of Treaties (1969), 1115 U.N.T.S. 331 20

Other Authorities

BLACK'S LAW DICTIONARY (10th ed. 2014) 15, 21

COLLINS FRENCH-ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com 16

Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* (4th ed. 2016) 3, 5, 17

J. Gregory Sidak & Daniel F. Spulber, *Monopoly and the Mandate of Canada Post*, 14 YALE J. ON REG. 1 (1997) 7

United States Postal Service, *Universal Service and the Postal Monopoly: A Brief History (2008), available at https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf* 7

ARGUMENT IN REPLY

Water Splash's opening brief argued that Article 10(a) of the Hague Service Convention permits service of process by mail based on: (1) intrinsic evidence of intent (at 19-20, 24-26); (2) this Court's decision in *Schlunk*[1] (at 20-22); and (3) extrinsic evidence of the signatories' shared expectations (at 26-39). Against this, much of Menon's response brief argues that the Court may not consider such extrinsic evidence if a treaty's text is wholly unambiguous. Resp. Br. at 7-28; 36-45.

Menon's argument is a red herring because even without examining extrinsic evidence in this case, points (1) and (2), both independently and together, demonstrative that Water Splash's reading is at least reasonable. Accordingly, there is no need to rely on extrinsic evidence *unless* the Court determined that Menon's interpretation (or another) was also reasonable, thus resulting in an ambiguity. But in that event, Menon does not deny that the Court may consider extrinsic evidence, essentially all of which supports Water Splash (a point Menon does not try to refute). Thus, for Menon to prevail, she must show that Water Splash's interpretation is unreasonable *and* that her interpretation is reasonable. But as discussed herein, Menon cannot show either.

I. The view that "send" means or includes "serve" follows from *stare decisis* and intrinsic evidence.

A. *Stare Decisis*

In *Schlunk*, this Court examining the drafting history of the Convention and noted that "[t]he delegates

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[1] 486 U.S. 694 (1988).

. . . criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service." *Schlunk*, 486 U.S., at 701. The Court then concluded that:

> The final text of Article 1, . . . eliminates this possibility and applies only to documents transmitted for service abroad. The final report (*Rapport Explicatif*) confirms that the Convention does not use more general terms, such as delivery or transmission, to define its scope because it applies only when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended.

Ibid.

Given this limited scope of the Convention, it is at least reasonable to read Article 10(a)'s reference to the transmittal of judicial documents abroad as a means for effectuating service, even though the drafters used "send" (a broad verb) rather than "serve" (a narrower term of art). Indeed, given this limited scope, Article 10(a) would be superfluous if "send" excluded the concept of "service." Pet. Br. at 20-22.

To be sure, the decision in *Schlunk* was based in part on the drafting history of the Convention, which is extrinsic evidence. However, Menon takes no issue with that. Resp. Br. at 39 ("There was an ambiguity as to whether the forum State or the receiving State decides if the Convention applies, and therefore, the Court [in *Schlunk*] resorted to extra-textual materials to answer the question.").

Although this Court could decide to revisit

Schlunk, Menon does not argue in favor of that, and general principles of *stare decisis* counsel against it. See *Hilton* v. *S.C. Pub. Railways Com'n*, 502 U.S. 197, 202 (1991) ("Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." (internal quotation marks omitted)).[2] As such, *Schlunk*'s determination of the scope of the Convention, both alone and in conjunction with the canon that legal instruments should be construed to avoid rendering provisions superfluous,[3] provides at least a reasonable basis for Water Splash's interpretative position without resort in this case to extrinsic evidence.

B. Intrinsic Evidence

Alternatively, even if the scope of the Convention were not limited to the regulation of transmittals for effectuating service, any reading of "send" that excluded the concept of "service" would still render meaningless a State's right to object in Article 10(a) to the use of the mails because there is no cognizable basis for a State to object to a litigant using its postal

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[2] See also Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* 15 ¶ 37 (4th ed. 2016) (stating that *Schlunk*'s holding was "broadly accepted" at the 1989 Special Commission meeting); cf. *Medellin* v. *Dretke*, 544 U.S. 660, 689 (2005) (O'Connor, J., dissenting from dismissal of writ as improvidently granted) ("In the past the Court has revisited its interpretation of a treaty *when new international law has come to light*." (citing *United States* v. *Percheman*, 7 Pet. 51, 89, 8 L.Ed. 604 (1833) (emphasis added)).

[3] See *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

channels *solely for non-service purposes*. Pet. Br. at 24-26. Against this, Menon claims that this right of objection does have meaning:

> The response to [Water Splash's] argument is simple: the penalty for use of mail to ***serve*** any document when a use-of-mail objection has been lodged would be non-enforcement of documents sent by mail from the forum State.

Resp. Br. at 34 (emphasis added).[4] But this proves Water Splash's point: namely, that the only cognizable purpose of a State's right to object under Article 10(a) is to prevent judicial documents sent by mail from having legal effect as a properly served document. Yet if Article 10(a) precluded service by mail (*i.e.*, because "send" does not mean or include "serve") then any

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[4] Menon's quoted statement regarding the "non-enforcement of documents" is primarily directed at "non-service-of-process" ("post-answer") documents. Resp. Br. at 30, 33. And certainly, a failure to properly service post-answer documents might be penalized *within* a proceeding. But assuming valid service of process, it is unclear whether a party could expect to obtain relief from a final judgment simply because some post-answer documents were not properly served. The Convention only limits the entry or finality of default judgments in connection with situations involving a writ of summons or equivalent. See Convention, Arts. 15, 16 (J.A. 10-12). Federal law provides relief from a final judgment based on ineffective service of process. See *Combs* v. *Nick Garin Trucking*, 825 F.2d 437, 442 & n. 42 (D.C. Cir. 1987). Texas law also provides relief for lack of service of process, as well as lack of notice of a default judgment itself. See *Katy Venture, Ltd.* v. *Cremona Bistro Corp.*, 469 S.W.3d 160, 163-64 (Tex. 2015). But Water Splash is otherwise unaware of a general basis to avoid a final judgment based on a plaintiff's failure to serve other documents. Cf. *United States* v. *Martin*, 395 F. Supp. 954, 960 (S.D.N.Y. 1975) (holding that defendant could not avoid default judgment despite United States' failure to give notice of application for, or entry of, default judgment).

need for a State to object in order to prevent such documents from having legal effect vanishes because, under that interpretation, documents cannot be sent by mail for service in the first place.

Consistently, the Conference's Special Commission of 1977 concluded that, even where a State had objected to the use of mail under Article 10(a), a party may still use mail for non-service purposes:

> "An objection to postal channels as a means of service does not extend to a situation where the postal channels are used as a mere supplement to another form of service. The Special Commission of 1977 held that in such a case, the use of postal channels should not be treated as an infringement of the sovereignty of the State of destination, and thus should be accepted, notwithstanding an objection to Article 10(a)."

Hague Conference on Private International Law, Permanent Bureau, *Practical Handbook on the Operation of the Service Convention* 83 ¶ 260 (4th ed. 2016) (hereinafter, "PRACTICAL HANDBOOK (2016)").

To be clear, the above reference is relevant not simply as extrinsic evidence of the signatories' shared expectations, but rather to show the reasonableness of Water Splash's structural argument: namely, that the use of mail for non-service purposes "should not be considered as being an infringement on the sovereignty of the State addressed," *ibid.*, in the first place, and thus the right to object in Article 10(a) has no cognizable purpose if "send" does not at least include "service." Rather, as the Special Commission reasoned, even with an objection, parties could use the mails for non-service transmittals, which would be just as true if the Convention never existed. The right to object is

superfluous if "send" excludes "service."

Menon also argues that the use of the mails for service is contrary to some of the stated purposes of the Convention:[5] namely, the Conference's desire "to improve the organization of mutual judicial assistance" in connection with "simplifying and expediting the procedure" for ensuring timely notice of judicial documents. Resp. Br. at 32-33 (quoting Convention, Preamble (J.A. 5)); see also Resp. Br. at 33 (describing "mutual judicial assistance" in terms of "cooperation between the governmental channels of the receiving and requesting nations"). Menon specifically contends that there is "nothing about these dual purposes [in the preamble] that contemplates complete removal of governmental involvement in the initiating service of process procedures," which Menon views as the effect of "direct mail without government assistance." Resp. Br. at 28, 33.

But service of process by mail does not eliminate the government's role in initiating or assisting with service. Indeed, when drafted in 1964, the Convention's use of the term "postal channels" in Article 10(a) was clearly a reference to the longstanding communication systems operated or regulated by governments, not private enterprise.[6]

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[5] Menon argues that focusing on a treaty's purpose "shifts the law-making function from the political branch to the judicial branch." Resp. Br. at 12. But if purpose is determined by a valid interpretative method and if it limits the reasonable scope of an instrument, it at least provides a valid context for understanding the instrument's provisions.

[6] See *United States Postal Serv.* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 121 (1981) ("By the early 18th cen-

In other words, "postal channels" are "governmental channels." Consistently, the Convention uses the term "channels" in connection with both "postal" channels (Article 10) as well as with two other government channels of transmission outside the Central Authority mechanism. See Convention, Arts. 9, 10 (J.A. 8-9). (referencing diplomatic and consular channels). The Convention also refers collectively to these three governmental channels as "channels of transmission" (Art. 11)[7] and "methods of transmission" (Art. 21). J.A. 9, 13.

In addition, with respect to service of process by mail, the initiating judicial document (the summons) issues from a governmental entity, not a private party, and is then mailed via postal channels to the defendant. Depending on forum law, this may also involve further governmental action beyond the postal

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tury, the posts were made a sovereign function in almost all nations because they were considered a sovereign necessity."). In the United States, the Postal Service's monopoly on delivery of time-sensitive documents ("letters") existed until 1979. See United States Postal Service, *Universal Service and the Postal Monopoly: A Brief History* (2008), *available at* https://about.usps.com/universal-postal-service/universal-service-and-postal-monopoly-history.pdf. Similarly, the Canada Post was an office of the government before becoming a Crown Corporation in 1981. See J. Gregory Sidak & Daniel F. Spulber, *Monopoly and the Mandate of Canada Post*, 14 YALE J. ON REG. 1, 6 (1997).

[7] Indeed, Article 11 provides that "[t]he present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, *channels of transmission other than those provided for in the preceding articles* and, in particular, direct communication between their respective authorities." J.A. 9 (emphasis added). Contextually, this also indicates that the previously mentioned governmental channels (consular, diplomatic, and postal) were channels for service.

channels.[8]

Menon argues that allowing service by mail is likely to result in enforceable judgments against defendants who had no notice of the underlying proceeding and that such a result is both contrary to one of the concerns giving rise to the Convention as well as bad policy. Resp. Br. at 46. Menon's supports this with the following statement from the concurrence in *Schlunk*:

> "a forum nation could prescribe direct mail service effective upon deposit in the mailbox, or could arbitrarily designate a domestic agent for any foreign defendant and deem service complete upon receipt domestically by the agent even though there is little likelihood that service would ever reach the defendant."

Schlunk, 486 U.S., at 707 (Brennan, J., concurring).

But in that statement, the phrase "little likelihood that service would ever reach the defendant" is a reference to service on an "arbitrarily designated domestic agent." The reference to service by mail is just another example of how a forum might avoid the Convention altogether by authorizing means of service that became effective *within the forum itself* (*i.e.*,

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[8] Here, the Texas secretary of state transmitted process by mail. Pet. Br. at 11. Texas and federal law also authorize others to serve process, including some governmental agents. See TEX. R. CIV. P. 103 ("Process . . . may be served anywhere by . . . any sheriff or constable or other person authorized by law . . . ."); FED. R. CIV. P. 4(e)(1) (generally allowing service to be accomplished pursuant to state law, unless provided otherwise by federal law); FED. R. CIV. P 4(c)(3) (by court order, service may be effected by a United States marshal).

prior to the transmission abroad of any documents).

Menon's argument that service by mail is bad policy is also contradicted by the extrinsic evidence showing that the treaties leading up to the Convention were understood to permit such service, that no change was intended by the Convention, and that, in fact, the signatories shared the expectation that service by mail was permitted absent objection. Pet. Br. at 26-37. As above, such extrinsic evidence is relevant here not as an aid to interpreting the treaty's language, but to refute Menon's argument that service by mail is inherently unreasonable as a policy matter.

Of course, if a signatory had concerns about the reliability of service by mail, the Convention provides a process for objecting to that provision. Convention, Arts. 10(a), 21 (J.A. 8, 13). And even absent objection, Articles 15 and 16 of the Convention limit the entry and finality of default judgments against defendants who did not receive actual notice of the proceedings. J.A. 10-12. Article 15 provides that a default judgment may not be entered unless a defendant was either served by a method allowed in the defendant's own State or the document was actually and timely delivered to the defendant or the defendant's residence,[9] while Article 16 provides that a defendant may appeal an otherwise final judgment within a reasonable time after actual notice of the judgment if the defendant lacked actual notice of the underlying proceedings and

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[9] Article 15 does authorize a State to permit entry of a default judgment absent proof of service (after a six-month waiting period) if "every reasonable effort has been made to obtain [such proof] through the competent authorities of the State addressed." J.A. 10.

presents a *prima facie* defense on the merits.[10] *Ibid.*

Menon also invokes the canon that presumes different words mean different things. Resp. Br. at 30 (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). But if other traditional interpretive tools lead to the conclusion that Water Splash's view is at least reasonable, the *Russello* canon should not be given determinative weight and render unreasonable an otherwise reasonable interpretation, especially where considerations of *stare decisis* are involved. Cf. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."); *ibid.* (relying on "traditional tools of statutory construction and considerations of *stare decisis*" and declining to "resort to the sovereign immunity canon because there is no ambiguity left for us to construe").

In other words, while the *Russello* canon might provide a basis for *one* reasonable interpretation of a

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[10] Menon argues that "American courts will . . . not allow for enforcement of default judgments based on mail if there is no actual notice." Resp. Br. at 47 (citing *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988)). But under federal law, a default judgment may be enforceable absent actual notice if the notice given was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones* v. *Flowers*, 547 U.S. 220, 226 (2006) (internal quotation marks omitted); see *ibid.*, at 226 ("Due process does not require that a property owner receive actual notice before the government may take his property."). Absence of valid service of process, however, does render a judgment void. *See Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988).

treaty, it should not itself cancel a competing interpretation that is also reasonable and derives from other tools of interpretation that rely on intrinsic evidence of intent. Moreover, if anything, the *Russello* canon in particular should receive less weight than the canon against surplusage because the presumption that "words mean something" is at least logically more fundamental than the presumption that "different words mean different things."

Finally, as already noted, the limited scope of the Convention under *Schlunk* rebuts the *Russello* presumption, and even if the Convention's scope were not so limited, that presumption could still be satisfied if "send" were read to include both service and non-service transmittals. Pet. Br. at 24 & n.24.

II. Menon's view that "send" means "service of post-answer documents" is unreasonable.

Menon claims that service of process by mail is not permitted under Article 10(a), but then claims Article 10(a) does permit service, but of post-answer documents only:

> "[I]t is not absurd to include a provision on direct mail regarding service of post-answer judicial documents (such as motions or discovery) within a Convention that seeks to simplify the procedures by which judicial documents are served. In fact, it is quite logical to include in the same place provisions for service of both types of judicial documents .... Moreover, it would be natural to provide by treaty for both types of service because of the need, in both situations, for one nation's legal process to encroach upon the territorial jurisdiction of another, but only by consent to do so.....

> Because there is a logical reason for the text to deviate – namely, to provide for service of both type of judicial documents – and the text of Article 10 read in its ordinary manner leads to the conclusion that service of both type of judicial documents are contemplated, the Court should conclude that the text of Article 10 is unambiguous and that the variation between 'send' and 'effect service' was not 'an obvious drafting error.'"

Resp. Br. 30-31. As next shown, Menon's reading is unreasonable because (a) it is unsupported by the text of the Convention and (b) it introduces ambiguity regarding the meaning of other Convention terms ("service" and "judicial documents"), whose resolution by extrinsic evidence does not support Menon's position.

A. The text of the Convention does not distinguish between service of process and service of post-answer documents.

If the Convention applies to a particular document – *i.e.*, because it is a "judicial" or "extrajudicial" document that forum law requires to be transmitted abroad for "service" – then it must be "served" according to the Convention. *Schlunk*, 486 U.S., at 700 ("If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.").

But nothing in the text or structure of the Convention purports to make makes any distinction between service of process and service of other ("post-answer") documents. Thus, whether mail is permissible for service under Article 10(a) cannot depend—at least under the text of the Convention—on whether a judicial

document is process or not. Put another way, if mail is an impermissible means for serving a summons, there is no textual basis to say that mail is somehow permitted for serving a post-answer judicial document where "service" is required.

Rather, to adopt Menon's view, one must either (1) read Article 10(a) such that "send" actually means "serve" but "judicial documents" means—in Article 10(a) alone—"post-answer judicial documents," or (2) break the concept of "service" into two types of service: government-assisted or -initiated service (hereinafter, *"official service"*) versus party-initiated service (hereinafter, *"private service"*).

As to reading (1), the idea that "judicial documents" means something different in Article 10(a) than in the rest of the Convention is unsupported by any intrinsic evidence and violates the canon that identical terms are presumed to mean the same thing each time they are used.[11] (That said, this reading otherwise inherently supports Water Splash's point that the word "send" is at least broad enough to embrace the concept of legal "service." Pet. Br. at 23 n.23.)

With respect to reading (2), Menon argues that the Convention's drafters would have had a reasonable basis to differentiate methods for serving process versus methods for serving post-answer documents based on a distinction between official and private service as defined above. Resp. 33. And to be sure, under both

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[11] *Utility Air Regulatory Group* v. *E.P.A.*, 134 S. Ct. 2427, 2441 (2014) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

Texas and federal law, service of "process" requires involvement of at least one or more governmental actors,[12] while many, perhaps most,[13] post-answer documents may be served by private (party to party) transmittals.[14]

Water Splash agrees that a distinction between official and private service could have been a reasonable one for drafters of a service convention to make. But there is no textual support in the Convention suggesting that the drafters actually intended any distinction between process and other judicial documents, or between methods of serving one versus the other. The text of the Convention simply reflects no such distinctions.[15]

B. Menon's view is also based on unsupported assumptions regarding the meaning of other Convention terms.

Apart from being unsupported by the intrinsic evidence, Menon's view actually raises two additional interpretive questions. First, whether the term "service" itself is ambiguous. Based on Menon's argument, one

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[12] See, *supra*, at p. 7-8 & n.8.

[13] Service of some post-answer litigation documents, however, ordinarily involves a governmental actor, such as any post-answer documents that issue from the court itself (*e.g.*, orders, judgments), with some requiring additional official involvement (*e.g.*, writs of execution). See TEX. R. CIV. P. 629; FED. R. CIV. P. 4.1.

[14] See TEX. R. CIV. P. 21a(a)(2); FED. R. CIV. P. 5.

[15] The Convention limits the circumstances where a default judgment may be avoided to situations where "a writ of summons or an equivalent document" had to be served abroad. See Convention, Arts. 15, 16 (J.A. 10-12). But that reference to a process document does not make any distinction regarding types of service.

might question whether "service" under the Convention embraces both official and private service or is limited to official service. The Convention does not define "service" and general definitions do not obviously restrict its meaning to one type or the other. For example, Black's Law Dictionary (10th ed. 2014) defines "service" as "[t]he formal delivery of a writ, summons, or other legal process, pleading, or notice to a litigant or other party interested in litigation," which sounds like "official" service. But it also gives a more general definition – "the legal communication of a judicial process" – which might describe both official and private service. *Ibid.*

Second, Menon's view raises the question whether the term "judicial document" is ambiguous. Menon broadly uses this term to include all documents relating to a litigated matter, whether the document (1) was issued from a court (such as a summons, order, judgment, or writ of execution); (2) was filed with the court by a litigant (such as a pleading or motion); or (3) was exchanged between parties, even without a court filing (such as many discovery requests and responses). Resp. Br. at 30.

Black's Law Dictionary (10th ed. 2014) defines "judicial document" slightly differently, so as to cover both categories (1) and (2): "[a] court-filed paper that is subject to the right of public access because it is or has been both relevant to the judicial function and useful in the judicial process," referencing a 2006 case for this definition. *Ibid.* (citing *Lugosch* v. *Pyramid Co. of Onandaga*, 435 F.3d 110, 119 (2d Cir. 2006)).

On its face, however, the term "judicial document" could at least reasonably be read to only mean a document in category (1): a document issuing from a court

(*i.e.*, a "judicial" document). Consistently, although the English text of the Convention uses the term "judicial documents," the French text, which is equally authentic,[16] uses the term "*actes judiciaires*."[17] The French word "*judiciaire*" translates to "judicial," but the French word "*acte*" translates to "act" or "certificate," rather than "document."[18]

In addition, the English term does not appear to be a frequently used term of art. Apart from *Schlunk*, the term "judicial document" apparently is used in only one other opinion of this Court, also in a context most consistent with category (1). See *Grin* v. *Shine*, 187 U.S. 181, 190 (1902) (discussing extradition treaty which provided that "when the person whose surrender is asked shall be merely charged with the commission of an extraditable crime or offense, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document").

And extrinsic evidence supports a definition limited to documents issuing from a judicial official or other authority. According to the Hague Conference's most recent handbook:

> "Judicial documents for the purposes of the Convention are instruments of contentious or non-contentious jurisdiction, or instruments of

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[16] Pet. Br. at 28 n.27.

[17] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (French), *available at* https://www.hcch.net/fr/instruments/conventions/full-text/?cid=17.

[18] See COLLINS FRENCH-ENGLISH DICTIONARY, *available at* https://www.collinsdictionary.com.

enforcement."

PRACTICAL HANDBOOK (2016) at 29 ¶ 77. The handbook also lists specific examples of judicial documents, all but one of which ("the defendant's reply") would appear to be documents issuing from a judicial or other authority:

> "Judicial documents include writs of summons, the defendant's reply, decisions and judgments delivered by a member of a judicial authority, as well as summons for witnesses and expert witnesses abroad, and requests for discovery of evidence sent to the parties even if these are orders delivered as part of evidentiary proceedings."

Ibid. (footnotes omitted).[19] The idea that judicial documents issue from a judicial officer or other authority is also implied by the handbook's discussion of forum law:

> "Characterisation as a judicial or extrajudicial document depends on the law of the requesting State (State of origin). This seems to be indisputable since it is that law which determines the power of the authorities and judicial officers to issue a given document, and which determines whether there is occasion to transmit the

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[19] The handbook did criticize a state court decision for construing "judicial documents" to exclude all post-summons documents. See PRACTICAL HANDBOOK (2016) 31 ¶ 81 (citing *Chabert* v. *Bacquie*, 694 So. 2d 805, 812 (Fla. Dist. Ct. App. 1997)). But that criticism was consistent with a definition limiting judicial documents to those issued by a judicial official or other authority, as the post-summons document at issue in *Chabert* was a statement of appeal that local law required to be transmitted for service by a judicial official. 694 So. 2d, at 812.

document for service abroad."

Id., at 30 ¶ 80 (emphasis removed).

Yet if "judicial documents" are limited to litigation-related documents issuing from a judicial or other official, then occasions for "service" under the Convention would be more limited than Menon suggests and, at least with respect to domestic practice, would seem to exclude most of the "privately" served documents that Menon mentions (motions, discovery). Resp. Br. at 30.

To be clear, whether this means "service" was intended to be limited to "official service" or whether "judicial documents" was intended to be limited to documents issuing from a judicial or other authority, Water Splash's point here is simply that Menon's reading is not supported by the intrinsic evidence of intent: (1) the idea that "send" means "private service of post-answer documents" is unsupported because the treaty does make such distinctions between types of service or types of judicial documents; and, more generally, (2) the idea that the drafters intended to make such distinctions itself makes assumptions about the meaning of terms the Convention does not define ("service," "judicial documents") and that do not obviously follow from their ordinary meanings in English and French or the extrinsic evidence cited above. For these reasons, Menon's competing interpretation of Article 10(a) is not reasonable.

III. When interpreting an unclear treaty, extrinsic evidence should not be displaced by a canon of construction.

Menon suggests that the Court has not squarely answered whether extrinsic evidence may be considered in the face of an unambiguous treaty. Resp. Br.

at 7. On the one hand, some historical statements by this Court have suggested that extrinsic evidence may be relevant even absent textual ambiguity in some limited circumstances. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' (quoting *Maximov* v. *United States*, 373 U.S. 49, 54 (1963)). On the other hand, the Court more recently held that, when confronted by unambiguous text, a treaty's drafting history was off limits:

> "We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous . . . . But where the text is clear, as it is here, we have no power to insert an amendment."

Chan v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). Thus, absent at least some ambiguity, resort to extrinsic evidence of intent may be precluded, apart from potentially "absurd" results.[20]

Since *Chan*, however, this Court has at least noted the historical principle that "treaties are construed

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[20] Menon acknowledges that a court may ignore the plain meaning of a treaty's language to prevent an absurd result. Resp. Br. at 25 n.17, 36-37, 42.

more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991); see also *Factor* v. *Laubenheimer*, 290 U.S. 276, 293 (1933) (collecting cases).

One way to reconcile these interpretative concepts would be to consider extrinsic evidence in connection with, rather than apart from, some canons of construction. In other words, in the face of at least some textual uncertainty, a canon of statutory construction like the one in *Russello* should not trump extrinsic evidence.[21] Cf. *Richlin Security Service Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) ("The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction."); Vienna Convention on the Law of Treaties (1969) § 3, 1115 U.N.T.S. 331 (providing principles of interpretation without reference to canons of construction).

To be sure, the United States has not ratified the Vienna Convention on the Law of Treaties, and that treaty also post-dates the drafting of the Hague Service Convention. Even so, it at least suggests that the elevation of particular statutory interpretative canons above extrinsic evidence may be debatable as a means of understanding the objective intentions of drafters of multilateral treaties.

Again, Water Splash is not asking the Court to

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[21] Here, the court of appeals applied the *Russello* canon to the exclusion of extrinsic evidence. Pet. Br. at 15-16.

consider extrinsic evidence absent at least some determination that the meaning of the intrinsic evidence is "uncertain." See BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "ambiguity" as "[d]oubtfulness or uncertainty of meaning or intention, as in a contractual term or statutory provision; indistinctness of signification, esp. by reason of doubleness of interpretation."). But if treaties are different from both statutes and private contracts, and if that difference supports a more flexible form of interpretation as historically indicated, then the approach discussed above at least avoids the separation of powers concerns raised by Menon.

Water Splash otherwise responds to some of Menon's subsidiary points as follows:

Menon notes that treaties which are not self-executing have no effect under domestic law absent implementing legislation. Resp. Br. 9, 10 n.7, 14, 23. While that may be relevant in other cases, it is not relevant here because the Hague Service Convention is self-executing given this Court's holding that "the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Schlunk*, 486 U.S., at 699 (citing Supremacy Clause, U.S. Const., Art. VI). Indeed, Menon's ability to challenge whether service complied with the Convention inherently depends on this.

Menon also states that "The Constitution places the law-making function in the case of treaty formation on the President as negotiator of a treaty and on the legislature as adopting the treaty." Resp. Br. at 10. In the case of a self-executing treaty, however, Congress's role is limited to the Senate's advice and consent to the President's ratification of the treaty.

And as previously shown, such consent was given here only after the Executive Branch informed the Senate that the treaty in question allowed service by mail, a position the Executive Branch has maintained. Pet. Br. at 32-34.

Menon argues that giving special weight to the Executive Branch's interpretation of a treaty or to the views of foreign courts usurps the judiciary's obligation to say what the law and constitutes a prohibited application of customary international law. Resp. Br. at 13-28. But at least where meaning is uncertain, examining such extrinsic evidence is not delegating a legal decision to the Executive Branch or applying international law. It is just a way of gathering additional evidence of intent, the ultimate issue in matters of interpretation. Moreover, it is hard to imagine any workable alternative absent nullifying unclear instruments, a solution historically employed in only limited circumstances. See *United States* v. *Harriss*, 347 U.S. 612, 617 (1954) (explaining that a criminal statute is void if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

IV. If the court of appeals' decision is reversed, remand is procedurally appropriate.

Menon does not contend that the validity of service under Quebec law is relevant to the federal question presented, and Water Splash previously argued that it is not. Cert. Reply at 3-6. Water Splash has also taken the position that Menon did not present and preserve any issue related to Quebec law in the lower courts that could affect the validity of service in this case (*e.g.*, on some state law comity basis). *Id.*, at 6-7. However, since the court of appeals only addressed the

federal question presented, Water Splash does not dispute, as a procedural matter, that the case may be remanded for consideration of any preserved but unaddressed issues if the court of appeals' judgment were reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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RECORD
AND
BRIEFS

No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC., PETITIONER

v.

TARA MENON

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, authorizes transmission of judicial and extrajudicial documents for service of process from one contracting state to another contracting state. The question presented is whether Article 10(a) of the Hague Service Convention authorizes service of process by mail.

TABLE OF CONTENTS

Page

Interest of the United States 1
Treaty provisions involved 2
Statement 2
Summary of argument 7
Argument:
Article 10(a) of the Hague Service Convention permits service of process by postal channels 9
A. The text, context, and history of the Hague Service Convention show that Article 10(a), like the rest of the Convention, pertains to service of process 10
B. The Executive Branch has consistently interpreted Article 10(a) to permit service of process by postal channels 17
C. Other parties to the Convention agree that Article 10(a) permits service by postal channels 20
D. Policy concerns do not support the lower court's reading of Article 10(a) 27
Conclusion 30
Appendix — Treaty provisions 1a

TABLE OF AUTHORITIES

Cases:

Abbott v. *Abbott*, 560 U.S. 1 (2010) 17, 20
Air France v. *Saks*, 470 U.S. 392 (1985) 10, 14
Bankston v. *Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) 9, 18
Brockmeyer v. *May*, 383 F.3d 798 (9th Cir. 2004) 10, 24
Case C-412/97, *ED Srl* v. *Italo Fenocchio*, 1999 E.C.R. I-3874 23

Cases—Continued: Page

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Noirhomme v. *Walklate*, [1992] 1 Lloyd's Rep. 427 (Q.B.) (Eng.) 23
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Wang v. *Lin* (2016), 132 O.R. 3d 48 (Can. Ont. Sup. Ct. J.) 22
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Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163:
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Art. 1, 20 U.S.T. 362, 658 U.N.T.S. 165 ..... 3, 11, 12, 1a

Treaties, statutes and rules—Continued: Page

Art. 2, 20 U.S.T. 362, 658 U.N.T.S. 165, 167 ..... 2, 1a
Arts. 2-6, 20 U.S.T. 362-363, 658 U.N.T.S. 165, 167, 169 3
Art. 4, 20 U.S.T. 362, 658 U.N.T.S. 167 3
Art. 5, 20 U.S.T. 362, 658 U.N.T.S. 167 ..... 3, 12
Art. 6, 20 U.S.T. 363, 658 U.N.T.S. 169 3
Art. 8, 20 U.S.T. 363, 658 U.N.T.S. 169 ..... 3, 4, 12, 13, 14, 2a
Art. 9, 20 U.S.T. 363, 658 U.N.T.S. 169 ..... 3, 12, 2a
Art. 10, 20 U.S.T. 363, 658 U.N.T.S. 169, 171 ..... *passim*. 2a
Art. 10(a), 20 U.S.T. 363, 658 U.N.T.S. 168 ..... 15, 16
Art. 10(a), 20 U.S.T. 363, 658 U.N.T.S. 169 ..... *passim*, 2a
Art. 10(b), 20 U.S.T. 363, 658 U.N.T.S. 168 15
Art. 10(b), 20 U.S.T. 363, 658 U.N.T.S. 169 ..... 11, 3a
Art. 10(c), 20 U.S.T. 363, 658 U.N.T.S. 170 15
Art. 10(c), 20 U.S.T. 363, 658 U.N.T.S. 171 ..... 11, 3a
Art. 11, 20 U.S.T. 363, 658 U.N.T.S. 171 ..... 12, 3a
Art. 13, 20 U.S.T. 364, 658 U.N.T.S. 171 12
Art. 14, 20 U.S.T. 364, 658 U.N.T.S. 171 ..... 1, 13
Art. 15, 20 U.S.T. 364, 658 U.N.T.S. 171, 173 ..... 9, 3a
Art. 15, 20 U.S.T. 364, 658 U.N.T.S. 173 ..... 29, 4a
Art. 19, 20 U.S.T. 365, 658 U.N.T.S. 175 ..... 13, 5a
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Art. 22, 20 U.S.T. 366, 658 U.N.T.S. 177 16
20 U.S.T. 367, 658 U.N.T.S. 181 15

Convention Relating to Civil Procedure, *done* Mar. 1, 1954, 286 U.N.T.S. 265 14

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Statutes and rules—Continued: Page

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28 U.S.C. 1608(a)(1)-(4) . . . 19
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Miscellaneous—Continued: Page

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Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (2d ed. 1992) 26
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In the Supreme Court of the United States

No. 16-254

WATER SPLASH, INC., PETITIONER

v.

TARA MENON

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS,
FOURTEENTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of Article 10(a) of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention or Hague Service Convention), *done* Nov. 15, 1965, 20 U.S.T. 363, 658 U.N.T.S. 169. As a party to the Convention, the United States has a vital sovereign interest in ensuring that the Convention is construed in accordance with its terms and with the intent of the United States and the Convention's other contracting states. The Department of State participated in the Convention's negotiation and in the process of securing the Senate's consent to its ratification in 1967. As contemplated by Article 14 of the Convention, the Department of State continues to work through diplomatic channels to resolve difficulties arising in the Convention's opera-

tion. The Office of International Judicial Assistance in the Department of Justice serves as the United States Central Authority in accordance with Article 2 of the Convention and is therefore responsible for administration of the Convention in this country. Thus, the United States has both a strong interest in and an important perspective on the question presented.

TREATY PROVISIONS INVOLVED

Pertinent portions of the Hague Service Convention are reprinted in the appendix to this brief. See App., *infra*, 1a-7a.

STATEMENT

1. The United States and Canada are among the 71 contracting states that have ratified or acceded to the Hague Service Convention,[1] which was formulated at the Tenth Session of the Hague Conference on Private International Law in 1964 and signed in 1965. See 1 Bruno A. Ristau, *International Judicial Assistance: Civil and Commercial* § 4-1-1, at 145 (2000) (Ristau). As its preamble recites, the Convention was intended "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and "to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure." App., *infra*, 1a. The Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial

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[1] See Hague Conference on Private Int'l Law, *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 (last visited Jan. 24, 2017).

or extrajudicial document for service abroad" and the address of the person to be served with the document is known. *Ibid.* (Art. 1).

The Convention provides for what has been called "one main channel of transmission" and for "several alternative channels of transmission." Hague Conference on Private Int'l Law, *Practical Handbook on the Operation of the Service Convention* ¶ 110, at 40 (4th ed. 2016) (2016 *Handbook*).[2] Under the main channel, described in Articles 2 through 6, an "authority or judicial officer" in the country "where the document to be served originates" will "transmit[] the document to be served to a Central Authority" of the country "where the service is to occur." *Id.* ¶ 111, at 40. Unless the Central Authority finds that the request does not comply with the Convention, see Art. 4, 20 U.S.T. 362, 658 U.N.T.S. 167, the Central Authority will "itself serve the document or shall arrange to have it served by an appropriate agency," Art. 5, 20 U.S.T. 362, 658 U.N.T.S. 167, and will prepare a certificate of service that "shall be forwarded directly to the applicant," Art. 6, 20 U.S.T. 363, 658 U.N.T.S. 169.

The Convention's alternative channels of transmission include direct and indirect "consular or diplomatic channels" (addressed in Articles 8 and 9), and three channels identified in Article 10. 2016 *Handbook* ¶ 237, at 76. Article 10 enumerates those three channels as follows:

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[2] Those categories are something of a misnomer, as "[t]here is neither a hierarchy nor any order of importance among the various channels of transmission, and transmission through one of the other channels does not lead to service of lesser quality." 2016 *Handbook* ¶ 236, at 75-76.

> Provided the State of destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

App., *infra*, 2a-3a. Article 21 further specifies that a contracting state that objects to any of the methods of transmission in Article 8 or 10 "shall * * * inform" the Ministry of Foreign Affairs of the Netherlands. *Id.* at 6a.

This case concerns whether Article 10(a)'s reference to "the freedom to send judicial documents, by postal channels, directly to persons abroad" should be read to pertain to the transmission of such documents for purposes of service of process.

2. From 2011 to 2013, petitioner, a Delaware corporation with its principal office in New York State, employed respondent, a citizen of Canada who resides in Québec, as a regional sales representative. J.A. 40, 50. Petitioner alleged that respondent began working for a competitor that used some of petitioner's designs and drawings when submitting a bid to the City of Galveston, Texas. J.A. 50. Petitioner sued respondent

(and the competitor) in Texas state court for unfair competition, conversion, tortious interference with prospective business relations, and conspiracy. *Ibid.*

Claiming it was unable to serve respondent in Texas, petitioner moved for authorization to use substituted service of process. J.A. 20, 50. A state procedural rule permits service on a party in a foreign country "pursuant to the terms and provisions of any applicable treaty or convention." Tex. R. Civ. P. 108a(1)(d). Contending that "the use of postal channels is a proper means of service under Article 10(a) of the Hague [Service] Convention," petitioner requested permission to serve respondent by "first class mail, certified mail, and Federal Express to [respondent's] address" in Québec and "by email to each of [respondent's] known email addresses." J.A. 19-20. The trial court granted the motion. J.A. 37-38.

Respondent did not file an answer or otherwise enter an appearance, and petitioner obtained a default judgment after the trial court found that respondent had been given proper notice of the suit and of the motion for default judgment and a hearing. J.A. 39-45. Respondent later moved to vacate the default judgment, contending that service had not been accomplished "pursuant to the terms of [A]rticle 10(a) of the Hague Service Convention." J.A. 51. The trial court denied the motion. J.A. 48.

3. The Court of Appeals of Texas (Fourteenth District) reversed and remanded. J.A. 49-58.

a. The court of appeals concluded that service by mail to a defendant in Canada is not permitted by the Hague Service Convention. J.A. 52-58. The court recognized that "Canada has not objected to the use of the mail for service of process." J.A. 55 n.1. It con-

cluded, however, that Article 10(a) of the Convention "prohibits service of process by mail." J.A. 55. In doing so, the court acknowledged that it was siding with the minority of state and federal courts to have considered the question, but it considered that view to be "the better-reasoned approach" because it "adheres to and applies the meaning of the specific words used in [A]rticle 10(a)." *Ibid.* In particular, the court emphasized that Article 10(a) uses the word "send," while other provisions throughout the Convention "use forms of the word 'service.'" *Ibid.* (quoting *Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002)). It agreed with the Fifth Circuit's decision not to "presume that the drafters intended to give the same meaning to 'send' that they intended to give to 'service.'" *Ibid.* (quoting *Nuovo Pignone*, 310 F.3d at 384). The court further found its restrictive reading of Article 10(a) to be consistent with the Convention's "purpose" of "'ensur[ing] that plaintiffs deliver notice to foreign addressees in sufficient time to defend the allegation,'" because it would be "'unlikely that the drafters would have put in place'" the methods of service through Central Authorities or diplomatic channels "'while simultaneously permitting the uncertainties of service by mail.'" J.A. 56 (quoting *Nuovo Pignone*, 310 F.3d at 384-385).

b. Justice Christopher dissented. J.A. 59-93. In her view, the majority failed to follow this Court's "directions on the construction of treaties" and failed to "address the reasoning of courts that have reached a conclusion contrary to that of the Fifth Circuit." J.A. 60, 89-90. Justice Christopher considered, in turn, the purpose of the Convention (J.A. 70-72); the expectations of the parties to the Convention, as reflected in

its English and French texts, its negotiating and drafting history, and the understanding of the delegates (J.A. 73-75); the "unwavering[]" view of the Executive Branch that "Article 10(a) permits service by mail" (J.A. 75); the post-ratification interpretations of Article 10(a) by other parties to the Convention (J.A. 76-78); and the views of leading scholars (J.A. 78-79). In her view, all of those considerations pointed strongly away from the majority's reading of Article 10(a). She also elaborated on what she identified as flaws in the Fifth Circuit's reasoning in *Nuovo Pignone*. J.A. 80-87.

4. Petitioner was unsuccessful in seeking rehearing en banc by the court of appeals and discretionary review by the state supreme court. J.A. 95-98.

SUMMARY OF ARGUMENT

Although Article 10(a) of the Hague Service Convention does not affirmatively authorize service of process by mail, it is properly construed as permitting service of process by postal channels where such service satisfies otherwise applicable law.

A. The text of Article 10(a) must be read in the context of the rest of the Convention, which this Court has already held was intended to "appl[y] only to documents transmitted for service abroad." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 701 (1988). In that light, Article 10(a)'s reference to "send-[ing] judicial documents," App., *infra*, 2a, is readily understood as referring to the sending of documents through postal channels for purposes of service, rather than for some unspecified reasons that are disconnected from the Convention because they do not involve service. That reading is supported by the negotiating history of Article 10(a), which includes a report de-

scribing a materially identical earlier draft that discussed its applicability to "service." It is further supported by the derivation of the parallel phrase in the French version of the Convention, which had, in the context of earlier conventions, been consistently interpreted as applying to service. Finally, just a few months before the Convention was signed, a member of the U.S. delegation who was on the committee that drafted the Convention described Article 10 as permitting direct service by mail.

B. The Court should also give great weight to the views of the Executive Branch, which has consistently interpreted Article 10(a) to permit service of process by postal channels—from the report that accompanied the President's transmission of the Convention to the Senate to the guidance posted on the Department of State's website. Most conspicuously, in 1990, the Deputy Legal Adviser in the Department of State sent a letter to the Administrative Office of the U.S. Courts and the National Center for State Courts explaining the United States' disagreement with the first federal court of appeals that adopted the interpretation of the decision below.

C. Other parties to the Convention have consistently indicated that Article 10(a) permits service through postal channels. Many of them have done so in the course of either objecting, or making it clear that they do not object, to the use of methods set forth in Article 10(a). Several foreign courts have expressly stated their understanding that Article 10(a) permits service by postal channels, and we are not aware of any foreign decisions that agree with the decision below. In addition, multiple Special Commissions convened since 1977 and comprising representatives from many of the

Convention's contracting states have repeatedly concluded that Article 10(a) permits service by postal channels. In 2003, representatives of 57 countries unanimously reaffirmed the conclusion that Article 10(a)'s use of the term "send" is to be understood as referring to "service" through postal channels.

D. Policy concerns do not support the lower court's reading of Article 10(a). United States courts should not second-guess the comparative reliability of service by mail in countries that have not seen fit to lodge their own objections under Article 21. Postal channels are often more expeditious and cost-efficient than the other channels of transmission. And, to the extent that there is uncertainty in an individual case about whether a mailed document was actually received, Article 15 provides protections for defendants.

ARGUMENT

ARTICLE 10(a) OF THE HAGUE SERVICE CONVENTION PERMITS SERVICE OF PROCESS BY POSTAL CHANNELS

The decision below, like those of other courts that have reached a similar conclusion, relied principally on the supposed contrast between Article 10(a)'s reference to "send[ing]" judicial documents and the references in many other articles of the Convention to the "service" of documents. See J.A. 55-56; see also, *e.g.*, *Nuovo Pignone, SpA* v. *STORMAN ASIA M/V*, 310 F.3d 374, 383-384 (5th Cir. 2002); *Bankston* v. *Toyota Motor Corp.*, 889 F.2d 172, 173-174 (8th Cir. 1989). All of the traditional tools of treaty interpretation, however, support the conclusion that Article 10(a)'s reference to "send[ing]" documents pertains—like the rest of the Convention—to the "service" of documents. Although the Convention does not itself affirmatively

authorize service of process by mail, it is properly construed to *permit* such service when it would accord with otherwise applicable law. See *Brockmeyer* v. *May*, 383 F.3d 798, 803-804 (9th Cir. 2004).[3]

A. The Text, Context, And History Of The Hague Service Convention Show That Article 10(a), Like The Rest Of The Convention, Pertains To Service Of Process

When interpreting a treaty, the Court "begin[s] 'with the text of the treaty and the context in which the written words are used.'" *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988) (quoting *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522, 534 (1987) (in turn quoting *Air France* v. *Saks*, 470 U.S. 392, 397 (1985)). If the text and context of the treaty are ambiguous, the Court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.* at 700 (citations omitted).

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[3] Respondent has contended (Br. in Opp. 6-9) that the judgment below could be affirmed on the alternative ground that, when this suit began, the Province of Québec had not yet adopted legislation to execute the Hague Service Convention. That question of foreign law, however, was not addressed by the state courts, and petitioner has questioned whether respondent preserved her argument as a matter of state procedural law. See Cert. Reply Br. 6-7. In any event, this Court typically does not address in the first instance questions that were not decided below. See, *e.g.*, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012). Accordingly, this brief does not address the potential effect of Québec law on the validity of the service in this case. (Article 494 of Québec's Code of Civil Procedure now affirmatively states that the Hague Service Convention "has force of law in Québec." Code of Civil Procedure, c. C-25.01, art. 484 (Can.), *LégisQuébec*, http://legisquebec.gouv.qc.ca/en/pdf/cs/C-25.01.pdf (last updated Dec. 1, 2016).)

1. Article 10(a) of the Convention states that, if "the State of destination does not object," the Convention "shall not interfere with * * * the freedom to send judicial documents, by postal channels, directly to persons abroad." App., *infra*, 2a. Unlike the other two paragraphs of Article 10, which reference methods to "effect service of judicial documents," *id.* at 3a, Article 10(a)'s reference to postal channels does not use the term "service." It must not, however, be viewed in isolation. In context, its reference to "send[ing] judicial documents" is readily understood as referring to the sending of documents through postal channels for purposes of service. The court of appeals' contrary reading would transform Article 10(a) into a bizarre and solitary interloper—the only portion of the Convention that would be about something other than service of documents.

a. The full title of the Hague Service Convention indicates that it is concerned with "Service Abroad." Its preamble explains that the Convention was intended "to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and to "simplify[] and expedit[e]" the procedures for doing so. App., *infra*, 1a. Then, in establishing the general scope of the Convention, Article 1 provides that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Ibid.*

As this Court has previously explained, the Convention's negotiating history demonstrates that its applicability was consciously limited to instances requiring the transmission of documents to other countries

for purposes of "service of process in the technical sense." *Schlunk*, 486 U.S. at 700. A preliminary draft of Article 1 referred to "all cases in which there are grounds *to transmit or to give formal notice of* a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad." *Id.* at 700-701 (translating the French text from 3 Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 65 (1965)). That preliminary draft, however, was criticized for "suggest[ing] that the Convention could apply to transmissions abroad that do not culminate in service." *Id.* at 701. As a result, the final version of Article 1 was revised, such that the Convention now "applies only to documents transmitted for service abroad." *Ibid.* The decision below cannot be reconciled with this Court's authoritative construction of Article 1 and the negotiating history upon which the Court relied.

The Court's reading of Article 1 is buttressed by the many other provisions of the Convention that are expressly tied to service of process rather than transmission of documents for some other purpose. Article 5 obliges a Central Authority that receives a request for service either to "serve the document" or to "arrange to have it served." 20 U.S.T. 362, 658 U.N.T.S. 167. Article 8 permits a contracting state to "effect service of judicial documents" through its diplomatic or consular agents, and Article 9 permits the use of consular or diplomatic channels "to forward documents, for the purpose of service." App., *infra*, 2a; see, *e.g.*, *id.* at 3a (Art. 11) (permitting contracting states to agree to alternate channels of transmission "for the purpose of service of judicial documents"); Art. 13, 20 U.S.T. 364, 658 U.N.T.S. 171 (restricting grounds upon

which a state may refuse to comply with "a request for service" that complies with the Convention); Art. 14, 20 U.S.T. 364, 658 U.N.T.S. 171 (providing that disputes over "the transmission of judicial documents for service" will be settled diplomatically); App., *infra*, 5a (Art. 19) (providing that the Convention will not alter a contracting state's law permitting other methods of transmission "of documents coming from abroad, for service within its territory").

Because the scope of the entire Convention thus was intentionally limited to "documents transmitted for service abroad," *Schlunk*, 486 U.S. at 701, there is no reason to infer that Article 10(a) was intended, through the word "send," to refer exclusively to unspecified uses of postal channels that do *not* involve service of process. Rather, the language in Article 10(a) preserving the freedom to "send" judicial documents, by postal channels, "directly" to persons abroad can be explained by the fact that, in contrast to Article 10(a), all other methods of service identified in the Convention require the affirmative engagement of an intermediary to effect "service." The word "send" in Article 10(a) is the most natural way to describe the using of "postal channels" as an alternative way of effecting service—"directly"—without invoking an intermediary.

b. Moreover, the only provision of the Convention that refers to Article 10 does not give any indication that paragraph (a) was seen as unique or as being about a different topic than is the rest of the Convention. Article 21 directs each contracting state to give formal notice (to the Ministry of Foreign Affairs of the Netherlands) of any "opposition" that the contracting state has "to the use of methods of transmission pursuant to [A]rticles 8 and 10." App., *infra*, 6a. Article 8

applies only to "service of judicial documents," as do paragraphs (b) and (c) of Article 10. *Id.* at 2a-3a. Article 21 thus indicates that the drafters perceived no categorical difference between the types of transmission of judicial documents addressed by those provisions and the type of transmissions governed by Article 10(a).

2. The negotiating history of Article 10(a) itself also provides strong support for the view that it refers to service of process. See *Saks*, 470 U.S. at 400 (recognizing that, in interpreting a treaty, "it is proper * * * to refer to the records of its drafting and negotiation").

The Rapporteur's report on the final text of the Convention, as adopted in the plenary session of the Hague Conference, "states that, except for minor editorial changes, Article 10 of the Convention corresponds to" the same article in an earlier draft. 1 Ristau § 4-3-5, at 205. The report about that draft version of Article 10, in turn, had explained as follows:

> a) Postal channels (para. 1)
>
> Paragraph 1 [designated "(a)" in the final text] of Article 10 corresponds to paragraph 1 of Article 6 of the 1954 Convention.[4]
>
> * * * * *
>
> The provision of paragraph 1 also permits service * * * by telegram if the state where *service* * * * is to be made does not object.
>
> The Commission did not accept the proposal that postal channels be limited to registered mail.

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[4] Convention Relating to Civil Procedure, *done* Mar. 1, 1954, 286 U.N.T.S. 265.

Ibid. (brackets in original) (translated by Ristau from the original French). The report about the draft version of Article 10 also noted that, as was the case under the similar provision of the earlier convention, service of process could be made by postal channels only if it was also "authorized by the law of the forum state." *Ibid.* Thus, the description of the earlier draft of Article 10 demonstrates that the drafters intended for the provision to permit service of process by postal channels in the absence of the receiving state's objection pursuant to Article 21.

3. That construction is also supported by the derivation of the parallel phrase in the French version of the Convention. The French text—which, according to the Convention's final clause, is "equally authentic" with the English text, 20 U.S.T. 367, 658 U.N.T.S. 181—contains the same potential anomaly, using a different word in Article 10(a) than in Article 10(b) and (c).[5] But "the verb '*adresser*' * * * , rendered in English by the verb 'send', had been used in substantially the same context in the three predecessor treaties [about civil procedure] drafted in The Hague [in 1896, 1905, and 1954]." 2016 *Handbook* ¶ 279, at 91. Even though the verb "*adresser*" is not actually "equivalent to the concept of '*service*,'" it had "been consistently interpreted" in the earlier treaties "as meaning service or notice." *Ibid.* The drafters accord-

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[5] Compare Art. 10(a), 20 U.S.T. 363, 658 U.N.T.S. 168 ("à la faculté *d'adresser* directement, par la voie de la poste") (emphasis added), with Art. 10(b), 20 U.S.T. 363, 658 U.N.T.S. 168 ("à la faculté, pour les officiers ministériels * * * de faire procéder à des *significations ou notifications*") (emphasis added) and Art. 10(c), 20 U.S.T. 363, 658 U.N.T.S. 170 ("de faire procéder à des *significations ou notifications*") (emphasis added).

ingly would have expected the same interpretation to apply to the term's appearance in the Hague Service Convention. In addition, Article 10(a) of the Hague Service Convention replaced Article 6(1) of the 1954 Convention (for states that were parties to both). See 1 Ristau § 4-3-5, at 204; see also Art. 22, 20 U.S.T. 366, 658 U.N.T.S. 177. In light of that history, it would be particularly incongruous if the similar French text in Article 10(a) were construed as eliminating the earlier understanding that postal channels could indeed be used for service when it is authorized by the law of the forum state and the receiving state does not object. See 1 Ristau § 4-3-5, at 205.

4. Other evidence contemporaneous with the negotiation of the Convention also supports the conclusion that Article 10(a) refers to service of process. Philip W. Amram was the member of the United States delegation who was the "principal American spokesman in the Committee of the Conference that produced the [Convention]." S. Exec. Rep. No. 6, 90th Cong., 1st Sess. 5 (1967) (S. Exec. Rep. No. 6) (reprinting statement of Deputy Legal Adviser Richard D. Kearney). In an article dated just a few months before the Convention's signing (and nine months after "[t]he final text of the Convention * * * was developed," 1 Ristau § 4-1-1, at 145), he summarized the Convention and stated that "Article 10 permits direct service by mail * * * unless th[e] state objects to such service." Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965).

Thus, when read in the context of the Convention, its negotiation history, the predecessors to the parallel French text, and contemporaneous statements by one

of its drafters, the text of Article 10(a) is best construed as permitting service of process through postal channels.

B. The Executive Branch Has Consistently Interpreted Article 10(a) To Permit Service Of Process By Postal Channels

"It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)). The decision below, however, contradicts the Executive Branch's longstanding position that Article 10(a) refers to service of process, not to the sending of documents for other unspecified purposes.

1. When President Johnson transmitted the Convention to the Senate in 1967 for its advice and consent, his transmittal letter noted that "[t]he provisions of the convention are explained in the report of the Secretary of State transmitted herewith." *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Message from the President of the United States*, S. Exec. C, 90th Cong., 1st Sess. 1 (1967). The accompanying report explained that "Articles 8 through 11 provide for channels of service entirely outside the central authority." *Id.* at 4. It further stated that "Article 10 permits direct service by mail or by any persons who are competent for that purpose in the state addressed unless that state objects to such service." *Id.* at 5 (emphasis added).

Consistent with that construction, U.S. delegate Amram testified before the Senate Foreign Relations Committee that use of the Central Authority is "not obligatory" and that "[o]ptional techniques" include,

"unless the requested State objects, direct service by mail." S. Exec. Rep. No. 6, at 13 (citing Article 10).

2. Since the United States ratified the Convention, the Executive Branch has consistently adhered to that construction of Article 10(a). In 1980, the Administrative Office of the U.S. Courts sent a memorandum to all United States District Court Clerks requesting, based on advice from the Department of State, that they "refrain from sending summonses and complaints by international mail to foreign defendants in those countries" that had "made a reservation with respect to Article 10(a) of the Convention." 2 Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law 1981–1988*, at 1447 (1994). Service by mail to defendants in non-objecting countries was not seen as a problem in the context of the Convention.

In 1989, the Eighth Circuit became the first federal court of appeals to hold that the Convention does not permit service by registered mail on a defendant in a foreign country. See *Bankston*, 889 F.2d at 174. A few months later, the Deputy Legal Adviser, Alan J. Kreczko, sent a letter to the Administrative Office of the U.S. Courts and the National Center for State Courts that expressed the Department of State's disagreement with the *Bankston* decision. See *United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan under the Hague Service Convention*, 30 I.L.M. 260, 260-261 (1991) (reprinting excerpts of March 14, 1990 letter). That letter concluded that "the decision of the Court of Appeals in *Bankston* is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy

of a summons and complaint by registered mail to a defendant in a foreign country." *Id.* at 261.

That view continues to be reflected on the Department of State's website, which explains that "[s]ervice by registered or certified mail, return receipt requested is an option in many countries in the world," but that "[s]ervice by registered mail should * * * not be used in the countries party to the Hague Service Convention that objected to the method described in Article 10(a) (postal channels)." U.S. Dep't of State, Bureau of Consular Affairs, *Legal Considerations: International Judicial Assistance: Service of Process*, https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process.html (last visited Jan. 24, 2017).[6]

The Court should give great weight to the Executive Branch's contemporaneous, longstanding, and consistent interpretation of Article 10(a). See, *e.g.*, *Medellin* v. *Texas*, 552 U.S. 491, 513 (2008).

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[6] Although not relevant here, additional considerations apply in cases involving efforts to serve sovereign defendants. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, provides the exclusive means of service for purposes of suing a foreign state in a U.S. court. See 28 U.S.C. 1608(a)(1)-(4); Fed. R. Civ. P. 4(j)(1). Section 1608(a) does not provide for service by a plaintiff on a foreign sovereign through postal channels without the foreign sovereign's consent. Similarly, "service on the U.S. Government cannot be effected through Article 10," even though "the United States does not object to Article 10 service by postal channels for private individuals or companies." U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Process on the United States Government* 2 (Nov. 4, 2016), https://www.justice.gov/civil/page/file/914441/download.

C. Other Parties To The Convention Agree That Article 10(a) Permits Service By Postal Channels

Because a treaty is "in its nature a contract between . . . [N]ations," the Court has recognized its "responsibility to read the treaty in a manner consistent with the *shared* expectations of the contracting parties." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014) (citations and internal quotation marks omitted). As a result, the views of the other states that are parties to the treaty are "entitled to considerable weight." *Abbott*, 560 U.S. at 16 (citations omitted). With respect to the Hague Service Convention, many of the United States' treaty partners have consistently indicated—both singly and in joint Special Commissions periodically convened to assist in the Convention's implementation—that Article 10(a) permits "service" through postal channels, so long as the receiving state has not exercised its right under Article 21 to object to that form of service.

1. In formally giving notice to the Ministry of Foreign Affairs of the Netherlands of their ratification or accession to the Convention (Article 21), several contracting states—including Canada—have made clear their understanding that Article 10(a) of the Convention refers to using postal channels for service of process, not sending documents for other purposes. In its 1988 accession to the Convention, Canada declared, under a heading referring to Article 10(a), that "Canada does not object to service by postal channels."[7] In

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[7] Dutch Gov't, *Treaty Database: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Parties with Reservations, Declarations, and Objections*, https://treatydatabase.overheid.nl/en/Verdrag/Details/004235_b (last visited Jan. 24, 2017) (entry for Canada).

1990, Pakistan declared that it does not object to "service by postal channels directly to the persons concerned (Article 10(a))."[8] In 2009, the Republic of Latvia, citing Article 10(a), declared that it "does not object to the freedom to send a judicial document, by postal channels, directly to an addressee within the Republic of Latvia * * * if the document to be served" satisfies certain conditions.[9] In 2010, Australia referred to Article 10(a) when declaring that "Australia does not object to service by postal channels, where it is permitted in the jurisdiction in which the process is to be served" and the documents are "sent via registered mail."[10] In 2016, Vietnam declared that it does not oppose "the service of documents through postal channels mentioned in paragraph a of Article 10" if the documents are "sent via registered mail with acknowledgment of receipt."[11]

Other contracting states have expressly *objected* to "service" pursuant to Article 10(a) or to having documents "served" through "postal channels."[12] By doing so, they have made clear their shared understanding that Article 10(a) would otherwise have permitted service by mail. Similarly, at least 13 states have declared their objection to all of the methods of transmission in Article 10 and described them collectively as involving "service," without discriminating between paragraph

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[8] *Ibid.* (entry for Pakistan).

[9] *Ibid.* (entry for Latvia).

[10] *Ibid.* (entry for Australia).

[11] *Ibid.* (entry for Vietnam).

[12] See, *e.g.*, *ibid.* (entries for the Czech Republic and Slovenia).

(a) and the rest.[13] Under the decision below, objections to "service" through postal channels would effectively be rendered meaningless; those states would have exercised their Article 21 power to object to Article 10(a) by objecting to something that Article 10(a) had not allowed in the first place.

To be sure, the declarations of some states have referred to the "sending," "transmitting," or "transmission" of documents under Article 10, or have referred to "service or transmission" or "transmission and service" under Article 10.[14] Such formulations do not clearly express a view on whether Article 10(a) refers to service. But no country has affirmatively indicated—either in its formal reservations, declarations, or objections, or, to our knowledge, anywhere else—that it shares the understanding of the decision below that Article 10(a) does *not* refer to service of process.

2. Nor are we aware of any foreign courts that have adopted the view of the decision below. To the contrary, several have expressly stated their understanding that Article 10(a) permits "service" through postal channels. For instance, an Ontario appellate court recently explained that "art. 10 of the Hague Service Convention provides that documents can be served directly by postal channels or local judicial officers of the state of destination, unless that state objects." *Wang* v. *Lin* (2016), 132 O.R. 3d 48, 61 (Can. Ont. Sup. Ct. J.). That statement was consistent with earlier Ontario cases that had recognized the validity of ser-

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[13] *Ibid.* (entries for Bulgaria, the People's Republic of China, Croatia, Germany, Greece, Hungary, India, Kuwait, Lithuania, Macedonia, Poland, the Russian Federation, and Turkey).

[14] See, *e.g.*, *ibid.* (entries for Luxembourg, Malta, Norway, San Marino, and Switzerland).

vice by mail on persons located in states that have not objected to Article 10(a).[15] In 1999, the Court of Justice of the European Union repeated without disagreement an Italian court's recognition that "Article 10(a) * * * allows service by post."[16] In 2000, a Greek Court of Appeal held that an Italian judgment was enforceable against a defendant that had been served in Greece by registered mail, because Greece had not yet objected to Article 10(a), which "envisaged" the "possibility of serving judicial documents in civil and commercial cases through postal channels."[17] In 1987, the Chancery Division of the English High Court concluded that the "service of a * * * summons by post on a resident of Belgium" was valid because Belgium had not objected to Article 10(a).[18] Such reasoning remains hornbook law in the United Kingdom.[19]

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[15] See *Purcaru* v. *Seliverstova*, [2015] O.J. No. 5615, para. 5 n.1 (Can. Ont. Sup. Ct. J.) (QL) (finding "service by mail" on Romanian respondent to be "appropriate and effective"); *Wilson* v. *Servier Can. Inc.*, [2003] O.J. No. 157, paras. 13-14 (Can. Ont. Sup. Ct. J.) (QL) (sustaining service of amended complaint by "regular mail" on French defendant under Article 10).

[16] Case C-412/97, *ED Srl* v. *Italo Fenocchio*, 1999 E.C.R. I-3874, para. 6.

[17] Efeteia [Efet.] [court of appeals] 3299/2000, p. 165, 168 (Greece).

[18] *In re Tucker (a Bankrupt)*, [1987] 1 W.L.R. 928 (Ch.), at 947 (Eng.), rev'd on other grounds, [1990] 1 Ch. 148 (C.A.) (Eng.); see *Noirhomme* v. *Walklate*, [1992] 1 Lloyd's Rep. 427 (Q.B.) (Eng.) (finding defendant duly served when, consistent with Article 10, documents originating Belgian court action were sent by post to England).

[19] See Maurice Kay et al., *Blackstone's Civil Practice 2013*, § 16.62, at 373 (13th ed. 2012) ("Service by post is also permitted under the Hague Convention provided the State of destination

In other words, we have no basis to doubt the Ninth Circuit's conclusion that foreign courts are "essentially unanimous" in disagreeing with the reasoning of *Bankston* and the decision below. *Brockmeyer*, 383 F.3d at 802; cf. 2016 *Handbook* ¶ 274, at 89 n.379 ("Space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process.").

3. Contracting states to the Convention have also collectively expressed their views about Article 10(a) in other ways. In particular, several Special Commissions have been convened by the Hague Conference on Private International Law to assist in the implementation of the Convention by providing a "forum for Contracting States to raise issues with the practical operation of the Convention, including differences with other States." 2016 *Handbook* ¶ 105, at 38.[20] Those Special Commissions have produced multiple reports making it clear that Article 10(a) is universally regarded by the contracting states as involving service.

The first such Special Commission was convened in 1977 and included 28 experts from 18 states and three international organizations. See *Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or*

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does not object (art. 10(a))."); David McClean, *International Cooperation in Civil and Criminal Matters* 43-44 (3d ed. 2012) (criticizing the *Bankston* line of cases in the United States as "wholly unjustified").

[20] See Statute of the Hague Conference on Private International Law, art. 7, *formulated* Oct. 9-31, 1951, 15 U.S.T. 2230, 220 U.N.T.S. 127 (providing for special committees to study any "questions of private international law that come within the purpose of the [Hague] Conference").

Commercial Matters (21-25 November 1977), 17 I.L.M. 319, 319 (1978). Those experts deemed Article 10(a) to be about service of documents, not transmission for other purposes. Thus, the portion of the 1977 report addressing the use of postal channels said that "[i]t was determined [by the Special Commission] that most of the States made no objection to the *service* of judicial documents coming from abroad directly by mail in their territory." *Id.* at 326 (emphasis added). And, in light of the Article 21 power to object, the report further observed that "[t]he States which object to the utilisation of *service* by post sent from abroad are known thanks to the declarations made to the Ministry of Foreign Affairs." *Id.* at 329 (emphasis added).

A second Special Commission was convened in 1989, with representatives from 22 states that were members of the Hague Conference. *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* ¶ 2, at 2 (Apr. 1989), https://assets.hcch.net/upload/scrpt89e_20.pdf. The resulting report on the Special Commission's work criticized "certain courts in the United States" for having concluded that "service of process abroad by mail was not permitted under the Convention." *Id.* ¶ 16, at 5. The report explained that "the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers," and further that "theoretical doubts about the legal nature" of "service by mail" are "unjustified"

when a contracting state has not declared reservations about Article 10(a). *Ibid.*

In 2003, a third Special Commission produced a set of conclusions and recommendations that were unanimously approved by representatives from 57 states that were members of the Hague Conference. *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions* ¶ 1, at 3 (Oct./Nov. 2003), https://assets.hcch.net/upload/wop/lse_concl_e.pdf (*2003 Conclusions and Recommendations*). In those conclusions, the Special Commission "reaffirmed its clear understanding that the term 'send' in Article 10(a) is to be understood as meaning 'service' through postal channels." *Id.* ¶ 55, at 11. There could scarcely be clearer evidence that the decision below is out of step with the views of the parties to the Convention.

The Special Commissions have also supported the preparation of a "practical handbook" about the operation of the Convention by the Permanent Bureau of the Hague Conference. Like the reports of the Special Commissions themselves, the last three editions of that handbook (in 1992, 2006, and 2016) have consistently described Article 10(a) as permitting the "service" of documents through postal channels, and they have expressly criticized the minority of U.S. courts that, like the decision below, have concluded otherwise.[21] The 2016 version of the *Handbook* reiterates

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[21] See Hague Conference on Private Int'l Law, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 42-45 (2d ed. 1992); Permanent Bureau of the Hague Conference on Private Int'l Law, *Prac-*

frustration that the Deputy Legal Adviser's 1990 letter about *Bankston* "does not seem to have had the desired effect," and notes that "only courts in the United States have had difficulties with the interpretation of [Article 10(a)]." 2016 *Handbook* ¶ 274, at 89. It rejects the Eighth Circuit's decision in *Bankston*, agrees with the Ninth Circuit's decision in *Brockmeyer* sustaining service by mail, and squarely concludes that "[s]ervice by mail under Article 10(a) is possible and effective." *Id.* ¶ 280, at 91.

In sum, there is overwhelming support for the conclusion that the United States' treaty partners construe Article 10(a) to permit service of process by postal channels. This Court should construe the Convention in light of that widely shared understanding.

D. Policy Concerns Do Not Support The Lower Court's Reading Of Article 10(a)

Although the decision below rests principally on the supposed textual disparity between "sending" and "serving" documents, it also suggests that its conclusion is supported by policy considerations. J.A. 55-56. In particular, the court of appeals suggested that the mail is too uncertain for service of process, especially when the Convention's drafters contemplated the use of other methods of service, including diplomatic channels and contracting states' Central Authorities. *Ibid.*; see *Nuovo Pignone*, 310 F.3d at 384-385. Those concerns are not well founded, and United States courts should not second-guess the comparative reliability of service by

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tical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ¶¶ 213-225, at 75-80 (3d ed. 2006); 2016 *Handbook* ¶¶ 270-282, at 87-91.

mail in countries that have not seen fit to lodge their own objections under Article 21.

There is no basis for the implication that postal channels are less likely to give foreign defendants notice of a suit "in sufficient time to defend the allegation." *Nuovo Pignone*, 310 F.3d at 384. Diplomatic channels are the "most time-consuming form of transmission." 2016 *Handbook* ¶ 239, at 76. And postal channels are not necessarily slow. Indeed, the drafters contemplated that postal channels could include service "by telegram." 1 Ristau § 4-3-5, at 205. The 2003 Special Commission recognized "the increasing use of private courier services for the expeditious transmission of documents" and "concluded that for the purposes of Article 10(a) the use of a private courier was the equivalent of the postal channel." *2003 Conclusions and Recommendations* ¶ 56, at 11.

Such courier services will often be significantly faster than the Convention's other channels. Many of the countries that allow for service by mail indicate that service through their Central Authorities takes weeks or months.[22] Others do not indicate how long service through their Central Authorities will take—resulting

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[22] Hague Conference on Private Int'l Law, *Authorities: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17 (last visited Jan. 24, 2017). See, *e.g.*, *ibid.*, entries for Australia ("up to 3 months or more"), Belarus ("one month"), Canada (listing average times ranging from two to six weeks), Macao and Hong Kong ("3-4 months"), Denmark (two months), Estonia ("[a]pproximately 3-6 months"), Finland (two weeks), France (rarely less than three months), Israel ("1-4 months"), Italy ("[o]ne or two months sometimes more"), Luxemburg ("[a]bout two weeks"), and Portugal ("[b]etween 30 and 60 days").

in a level of uncertainty and delay for litigants.[23] As in the United States, where a service request through the Central Authority will involve a $95 fee,[24] service through Central Authorities in other countries may also involve higher costs than service by postal channels. The United States favors a reading that, consistent with the purpose of the Convention, presents litigants with efficient and cost-effective options for service abroad.

Nor is there any basis to think that postal channels are simply too "unreliable," when compared with Central Authorities. Indeed, "[t]he postal channel * * * is commonly used" for the initial transmission of a document *to the Central Authority* abroad, and—after the Central Authority effects service—the postal channel may again be used to return the certificate of service. 2016 *Handbook* ¶ 134, at 46; see *id.* ¶ 212, at 69. And, when there is uncertainty about whether a mailed document was actually received, Article 15 provides protections for defendants, generally requiring proof that the document was served as required by the receiving state or that it was "actually delivered," and that service or delivery was effected in due time. App., *infra*, 3a.[25]

Construing Article 10(a) as precluding service of process by postal channels would make cross-border service of process more burdensome and would cause a

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[23] See, *e.g.*, *ibid.*, entries for Belgium, Bosnia and Herzegovina, Costa Rica, Cyprus, Iceland, Ireland, Romania, Spain, and United Kingdom.

[24] *Ibid.*, entry for United States.

[25] The second paragraph of Article 15 is less demanding, but is intended to "be applied rarely, in case where the defendant evades service in bad faith." 2016 *Handbook* ¶ 314, at 101.

substantial increase in the number of requests for service submitted to Central Authorities. Factoring in the execution time and cost associated with sending requests through foreign Central Authorities (or with the other methods of service in the Convention), the result may have a detrimental effect on U.S. and foreign litigants in cross-border litigation—disserving the Convention's express purpose of "simplifying and expediting" service abroad. App., *infra*, 1a (Pmbl.).

CONCLUSION

The judgment of the Court of Appeals of Texas (Fourteenth District) should be reversed.

Respectfully submitted.

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APPENDIX

The English version of Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, provides in pertinent part:

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organize the Central Authority in conformity with its own law.

* * * * *

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

* * * * *

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

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CHAPTER III—GENERAL CLAUSES

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Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

* * * * *

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

* * * * *

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

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